In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, APPELLANT,
v.
EARL B. COE.
No. 591.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE MOTION TO DISMISS THE APPEAL.

This is an appeal by the United States from a judgment of the Court of Private Land Claims confirming a Mexican grant in favor of the appellee to land in the Territory of Arizona. The motion to dismiss the appeal proceeds upon the ground that so much of the act establishing the Court of Private Land Claims (March 3, 1891, c. 539, sec. 9, 26 Stats., 854) as provides for appeals to this court is unconstitutional. The brief in support of the motion assumes that the act is otherwise valid. But the provision for an appeal to this court seems to be so

closely connected with the rest of the act that the fate of the entire act may be involved in the attack upon the constitutionality of the provision for appeal. An appeal to this court, whose judgment alone in that event is to be final, seems to be such an essential part of the scheme provided by Congress for the adjustment of these Mexican grants that it may well be doubted whether the rest of the act can stand if the provision for appeal is eliminated as unconstitutional.

By article 8 of the treaty of Guadalupe Hidalgo and article 5 of the Gadsden treaty the property of Mexicans within the territories ceded by Mexico to the United States was to be "inviolably respected," and they, their heirs, and grantees were to "enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States" (9 Stat., 929, 930; 10 Stat., 1035). But the duty of fulfilling these treaty obligations rests with the political department of the Government. Congress may either itself discharge that duty by passing directly upon the claims of private claimants, or it may, in its discretion, delegate the determination of such claims to a commission or to a board or to a judicial tribunal. In other words, while claimants under grants made by Mexico or the Spanish authorities prior to the cession have no *right* to a *judicial* determination of their claims (*Astiazaran* v. *Santa Rita Land and Mining Co.*, 148 U. S., 80, 81, 82, and cases cited), Congress may, nevertheless, provide for their determination by *judicial* proceedings if it sees fit. This latter proposition seems to be denied by the appellee, but it is not open to debate. It

is affirmed in terms by Mr. Justice Gray in *Astiazaran* v. *Santa Rita Mining Co.* (148 U. S., 80, 81, 82), and is involved in many prior decisions. In *United States* v. *Ritchie*, (17 How. 525, 533, 534), a proceeding in a district court of the United States for the determination of similar claims was sustained and an appeal therefrom to this court was allowed and determined. In that case the proceeding in the district court was designated an appeal from the California board of commissioners, but, being held invalid as such because the California board did not possess judicial power, it was sustained as an original proceeding in the district court. I do not, of course, suggest that the present appeal can be sustained as an original proceeding in this court, for its original jurisdiction is prescribed by the Constitution, and does not include such a case. The point to which I cite the case is this: That it is competent for Congress, if it sees fit, to provide for the *judicial* determination of claims against the United States for lands granted by the Mexican authorities prior to the cession.

To the same effect is *United States* v. *Arredondo* (6 Pet., 691, 709), where this court entertained an appeal from the superior court for the eastern district of Florida under the act of May 23, 1828, "for the settlement and confirmation of private land claims in Florida;" and in *Botiller* v. *Dominguez* (130 U. S., 238) are cited several cases of judicial proceedings to determine private land claims under treaties. Mr. Justice Miller concludes his opinion in that case by saying (pp. 255, 256):

> There can be no doubt of the proposition that no title to land in California dependent upon Spanish or Mexican grants can be of any validity which has not

been submitted to and confirmed by the board provided for that purpose in the act of 1851; or if rejected by that board, confirmed by the District or Supreme Court of the United States.

It was for the purpose of providing for the judicial determination of such claims that the act of March 3, 1891, establishing the Court of Private Land Claims was passed. It covers (section 6) lands "derived by the United States from the Republic of Mexico and now embraced within the Territories of New Mexico, Arizona, or Utah, or within the States of Nevada, Colorado, or Wyoming." The jurisdiction of the court is limited to the settlement of claims *as against the United States*, section 13, paragraph 5, providing that "no proceeding, decree, or act under this act shall conclude or affect the private rights of persons as between each other, all of which rights shall be reserved and saved to the same effect as if this act had not been passed." The question, therefore, is whether it is competent for Congress to create a court such as the Court of Private Land Claims for the settlement of the claims of private claimants *against the United States* to lands acquired by the United States under the Mexican treaties.

The objection taken to the court is that the judges are not appointed for life, and that they are therefore incapable of being invested with any portion of the judicial power of the United States. They are, however, appointed for the life of the court. Section 1 declares that "the judges of the Court of Private Land Claims shall hold their offices for a term expiring on the 31st day of December, A. D. 1895," and section 19 that "the powers and

functions of the court established by this act shall cease and determine on the 31st day of December, 1895."

We submit—

(1) That the Court of Private Land Claims is not one of the inferior courts mentioned in article 3, section 1, of the Constitution, but that it is a court, created in virtue of the general right of sovereignty of the Federal Government, for the settlement of disputed claims against the Government arising out of its treaty obligations; in other words, that while it exercises judicial power it is not "the judicial power of the United States" within the meaning of article 3; or, if this view be not sound,

(2) That under article 3, section 1, it is competent for Congress to vest any portion of "the judicial power of the United States" in judges who are appointed to hold during the continuance of their offices, although for a limited term; in other words, that the provision of the Constitution that "the judges of the supreme and inferior courts shall hold their *offices* during good behavior" means during good behavior and the continuance of the office.

I.

THE AUTHORITY FOR THE ESTABLISHMENT OF THE COURT OF PRIVATE LAND CLAIMS IS NOT FOUND IN ARTICLE 3, BUT IN OTHER PROVISIONS OF THE CONSTITUTION. IT IS A LEGISLATIVE AND NOT A CONSTITUTIONAL COURT.

While courts in which "the judicial power of the United States" is vested must be established subject to the limita-

tions as to the tenure of the office and the compensation of the judges prescribed by article 3, section 1 of the Constitution, it is well settled that that section of the Constitution does not exhaust the power of Congress to establish courts. In *American Ins. Co.* v. *Canter* (1 Pet., 511), Chief Justice Marshall, speaking of the Territorial courts, said:

> They are legislative courts created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States.

The Court of Private Land Claims is not invested with judicial power to settle controversies between persons, but only with power to settle as between private claimants and the United States the obligations assumed by the United States under their treaty with Mexico. This is not the exercise of the judicial power mentioned in article 3 of the Constitution, which extends "to cases in law and equity." The judicial power, it is true, extends also "to controversies to which the United States shall be a party," but that means controversies of an essentially *judicial* nature and does not include suits *against* the United States to enforce their political obligations under treaties.

The judicial power granted to the Federal Government by article 3 is the power to coerce *others* by the judgments of its courts, and not the power to submit claims *against itself* to judicial determination. The latter power every government has, as an incident of sovereignty, without grant. When, therefore, the Federal Government con-

sents, as it may, to submit claims against itself to judicial investigation and determination, it is at liberty either to select the ordinary judicial tribunals or to establish and ordain for that special purpose such courts as it sees fit. To courts so established the limitations of the Constitution affecting judicial tribunals invested with power to settle the claims of one person against another, have no application.

By the eleventh amendment it was in effect declared, contrary to the decision of the court in *Chisholm* v. *Georgia* (2 Dall., 419), that the judicial power conferred by article 3 does not include suits by individuals against States. Chief Justice Jay, in the course of his opinion in *Chisholm* v. *Georgia*, page 478, expressed the wish that the Constitution had extended the judicial power to cases *against* the United States, but was obliged to admit that it did not, and no one has ever been bold enough to make the claim. For any general discussion of the nature of the federal judicial power it is hardly necessary to go behind the learned opinions of Mr. Justice Gray in *Wisconsin* v. *Pelican Insurance Co.* (127 U. S., 265), and in *United States* v. *Lee* (106 U. S., 196, 223), where all the earlier decisions are marshaled.

The Constitution, article 2, section 2, gives authority to the President and the Senate "to make treaties." Article 1, section 8, confers power upon Congress "to constitute tribunals inferior to the Supreme Court," and "to make all laws which shall be necessary and proper for carrying into execution * * * all * * * powers vested by this Constitution in the Government of the United States

or in any department or officer thereof," and article 4, section 3, gives power to Congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States." These provisions of the Constitution are ample, we submit, to sustain the Court of Private Land Claims as an inferior tribunal established, not for the exercise of "the judicial power of the United States," mentioned in article 3, but to declare the rights of private claimants against the United States under a treaty, with respect to territory and property claimed by the United States.

It is hardly necessary to add, what I have already intimated, that I do not dispute the proposition of the appellee that the case is not one which can be brought within the original jurisdiction of this court. I also concede that, unless the Court of Private Land Claims is found to be a *judicial* tribunal, this court can not take cognizance of its judgments on appeal, for it is only from judicial tribunals, and not from boards or commissions, that appeals are allowable to this court under the Constitution, since an appeal, in the very nature of things, implies an original *judicial* hearing from which the appeal is taken. If the tenure of the judges, however, is found to be such as Congress may properly establish, no question is open as to the judicial character of the Court of Private Land Claims, for the act of Congress invests it, not only with the name and procedure of a court, but with all the essential characteristics of a judicial tribunal, including the most essential attribute of all, the power to bind the parties by its judgments.

II.

THE JUDICIAL POWER OF THE UNITED STATES UNDER ARTICLE 3 OF THE CONSTITUTION MAY BE VESTED IN TEMPORARY COURTS, PROVIDED THE JUDGES ARE APPOINTED FOR THE LIFE OF THE COURT.

The authority for the establishment of the Court of Private Land Claims as a legislative court under other provisions of the Constitution than article 3, section 1, seems to be sufficiently clear to relieve me from extended discussion of the question whether "the judicial power of the United States" under article 3 can be vested in temporary courts whose judges, although not holding office during their own lives, are nevertheless appointed for the life of the court. That question has never been presented to this court, and in view of the weighty consequences involved in its determination, will hardly be passed upon unless absolutely necessary to the decision of the case.

It is true that in several cases before this court involving an examination of the nature of the judicial power vested in the territorial courts, it has been said that the judges of those courts do not, and by reason of the limited term for which they are appointed, can not exercise "the judicial power of the United States" under article 3 of the Constitution, but it is to be noted that none of the cases present instances of an appointment *to last during the continuance of the office*. They are all instances of appointments for limited terms to *offices* which continue indefinitely, as in the case of territorial judges appointed for four years to an *office* created for an indefinite term, or

in the case put by way of illustration by Mr. Justice Jackson in *Kentucky and Indiana Bridge Co* v. *L. & N. R. R.* (37 Fed. Rep., 567, 612), an appointment as Interstate Commerce Commissioner for the term of six years to an *office* which continues indefinitely.

It was doubtless the intention of the framers of the Constitution to make the judges of the Federal courts independent of legislative control, but that is accomplished if the tenure of the judge is made coincident with the term of the office. But according to the appellee's view no judicial *office* can be created except for the life of one or more incumbents—a limitation not suggested or imposed by any clause of the Constitution.

It is to be observed that the question at bar is not whether a Federal judge, originally appointed for an indefinite term, can be deprived of his compensation and tenure by the *subsequent* abolition of the *office*, but whether it is competent for Congress in the first instance to establish a Federal court, under article 3 of the Constitution, which shall endure for only a limited period, provided the judges are appointed for the whole life of the court. A denial of this power imposes a serious limitation upon the authority of Congress without compensating advantages. In the nature of things the occasion for special tribunals, such as this court and the court of commissioners of Alabama claims, established by the act of June 23, 1874 (c. 459, 18 Stat., 245), is temporary. The independence of the judges is secured by appointing them for the full life of the court, but if the appellee's view prevails, the establishment of courts for such exigencies is practically impossible.

III.

THE COURSE OF PROCEDURE PRESCRIBED FOR THIS COURT ON APPEALS FROM THE COURT OF PRIVATE LAND CLAIMS DOES NOT HAVE THE EFFECT TO CONVERT SUCH APPEALS INTO ORIGINAL PROCEEDINGS.

The act provides (section 9) that—

> On any such appeal the Supreme Court shall retry the cause, as well the issues of fact as of law, and may cause testimony to be taken in addition to that given in the court below, and may amend the record of the proceedings below as truth and justice may require; and on such retrial and hearing every question shall be open, and the decision of the Supreme Court thereon shall be final and conclusive.

It is objected that the procedure thus prescribed makes the appeal in fact an original proceeding. It is admitted by the appellee that there is no objection to the direction that every question that was open in the court below shall be open in this court, for that is true of all equity appeals. The objection taken is that authority is given to this court to hear additional testimony. Even if that clause be beyond the constitutional power of Congress, it can easily be eliminated without affecting the rest of the act or the validity of the general provision for appeals. Indeed, the language is only directory and not mandatory. I submit, however, that authority to an appellate court to hear additional testimony does not change the appellate character of the proceeding, or convert it into an original proceeding. The hearing of further testimony—indeed, the hearing of the testimony *de novo*—is an incident of

appellate procedure in many jurisdictions. An appeal does not necessarily imply more than that the subject-matter has already been instituted in and acted upon by some other court. How the appellate jurisdiction shall be exercised depends entirely upon the legislature in the absence of constitutional limitations affecting the procedure. The declaration of the National Constitution is simply that this court "shall have appellate jurisdiction * * * under such regulations as the Congress shall make."

IV.

THE CONSTITUTIONALITY OF THE COURT SO FAR AS IT HAS JURISDICTION OVER LANDS IN THE TERRITORIES IS NOT OPEN TO DEBATE.

In so far as the act establishing the Court of Private Land Claims provides for the determination of claims against the United States to property situated in any of the Territories no objection can be taken to its validity, for it is clearly within the authority of Congress to establish in the Territories, or for the determination of the title to property situated in the Territories, such courts with such tenure in the judges as Congress sees fit. This is decided in the numerous cases that have been before the court involving an examination of the nature of the Territorial courts and the tenure of their judges. The cases are marshaled and reviewed by Mr. Justice Harlan in *McAllister* v. *United States* (141 U. S., 174, 180–184). In the case at bar the judgment concerns land in the Territory of Arizona. No reason is perceived why Congress might not have

directed the controversy to be submitted for decision to the Territorial court, whose judges are appointed for four years. I submit, therefore, that even if the act be found invalid so far as it undertakes to confer jurisdiction for the settlement of claims to land in the States of Nevada, Colorado, and Wyoming, it is constitutional as respects land "within the Territories of New Mexico, Arizona, or Utah," and the appellee's motion must be overruled. Neither he nor any claimant of lands situated in the Territories has a right, in any view, to complain of being remitted to a court whose judges are not appointed for life. And since the great bulk of the unsettled Mexican grants are for lands in the Territories, there is no objection to sustaining the Court of Private Land Claims in its jurisdiction over those lands, even if the act must be held invalid as to lands situated in the States.

The settlement of claims under Mexican grants made prior to the cession has long been deemed a matter of the greatest importance. To upset the scheme provided by Congress in this act establishing the Court of Private Land Claims involves the most serious consequences and embarrassment, not only to the Government, but to thousands of claimants. This much is said only for the purpose of suggesting to the court the practical importance of the question presented by the motion.

LAWRENCE MAXWELL, JR.,
Solicitor-General.

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No. 408

Brief of Atty. Gen. & Conrad & C

for Appellant

Filed Dec. 14, 1896.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
vs.
EARL B. ODE.
} No. 40.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

Statement, Abstract and Brief on behalf of the United States.

HOLMES CONRAD,
Solicitor-General.

MATTHEW G. REYNOLDS,
Special Assistant to the Attorney General.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
vs. No. 45.
EARL B. COE.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

Statement, Abstract and Brief on behalf of the United States.

STATEMENT AND ABSTRACT.

This suit was originally instituted February 2nd, 1892 by the Algodones Land Company, under the provisions of an act entitled, "An act to establish a Court of Private Land Claims and to provide for the settlement of private land claims in certain States and Territories," approved March 3rd, 1891.

Pending the litigation, the Algodones Land Company conveyed the property to Earl B. Coe, and upon motion the action was revived in his name.

The basis of the claim is an alleged grant which

shows: That one Fernando Rodriguez, on January 4th, 1838 at Hermosillo, presented a petition to the Treasurer General of the State of Sonora, Mexico, stating that he had sufficient means to settle and cultivate a tract of vacant desert land, on the northern frontier of the state, situated between the Colorado and Gila rivers, said lands including the tract from the southern side of the Gila river, in front of the junction of the same with the Colorado river, as far as the crossing (paso) of the Algodones, and from said point following the eastern margin of the Colorado river as far as the junction of the same with the Gila, a distance of five leagues.

"Wherefore in the name of the sovereign authority of the *State*" he formally registered the same and asked that a person be appointed to make the measurements and valuation and the necessary publications "as required by law."

He also offered at the proper time to furnish satisfactory evidence as to his ability to pay the just taxes (derechos) into the public treasury,

> "It being understood, Señor Treasurer, that the registry that I now make is under the condition that the settlement and occupation of the said vacant lands by me shall be when the notorious condition and circumstances of the region of the country in which said lands are situated may permit the same to be done; since the said vacant lands are situated in a country

> desert and uninhabitable, on account of the hostility of savages; it being well known that a settlement made by the Spanish Government in the desert country Colorado was entirely destroyed in a short time by the Yuma Indians and other savages, etc.," (R 8).

Such was the petition and the peculiar condition sought to be imposed by the petitioner upon the Treasurer-General of the State of Sonora.

On January 12th, 1838, at Arispe, the petition was received; it was ordered by Jose Justo Milla, Auditor of the Treasury of the State, that as the petitioner had ample means to carry out the undertaking, ample authority was conferred on Don Mauricio Carrillo, a resident of the Capital, to proceed to the measurement, valuation, and offer of sale of said vacant lands, but first to cite *the interested party* and colindantes (adjoining proprietors) to appear and defend their boundaries, said proceedings to be in entire conformity with the provisions of *sections 3, 4, 5, 6, and 7 of Chapter 90 of law No. 26 of the 11th of July, 1834*, and also with the regulations for measurements of lands for raising of cattle and horses, which regulations are formed in fulfillment of the requirement of law No. 30 of the 20th of July, 1825, adjusting the sitios by multiplying the number of varas contained in the diameter from north to south, by the number contained in that from east to west, so as to give to each sitio the area corre-

sponding to the sum of twenty-five millions of square varas, as required by the existing laws in relation to the matter.

When these proceedings were finished, the original with a topographical map of the land attached should be returned to the office; at the same time Carrillo was required to notify the interested party and others who might be interested bidders, that they might be present either in person or by agent, at the public sale of said lands which are to be made in the "Junta de Almonedas" in favor of the person who may be the highest bidder (R. 8 & 9).

On January 12, 1836, Mauricio Carrillo, the Commissioner, appointed his assistants as follows: —

Measurers, Juan Rios Candila[illegible] and Jose Maria Sais.

Counter, Julian Padillo.

Marker, Alonzo Maria Trecierra (R. 9).

On the same date the certificate is signed by Carrillo, Padillo and Trecierra, being respectively the commissioner, the counter and the marker, that the appointment of measurers, counter and marker had been accepted and the persons qualified (R. 9 & 10).

It will be noted, although this certificate is signed by the commissioner, counter and marker, it is not signed by the measurers.

On February 3rd, 1838, the survey is made as

stated, "on the vacant lands named El Paso de los Algodones" (R. 10).

It will be noted that although the report of the survey is signed by the petitioner (Rodriguez), the commissioner (Carrillo), the counter (Padilla), and the marker (Trecierra), it is not signed by the official measurers (Candelario and Sais), nor is there any other statement or note as to why they did not sign the record of their official acts, being the actual survey and one of the most important in the entire proceeding.

On February 4th, 1838, the day following the survey, the commissioner makes a peculiar certificate to the effect, that the measurements having been concluded, and with the approbation of the interested party, the officials and witnesses, he determined "*in view of the impossibility of taking further proceedings in the matter in this dangerous country*," and since the officials who made the measurements were sufficiently informed as to the character of the lands, he would proceed with his party to the other tract of vacant land, named "La Punta del Sargento," which he was commissioned to survey, etc., and upon the conclusion thereof they would return to Arispe for the purpose of concluding the expedientes (R. 10 & 11).

On March, 18th, 1838. at the City of Arispe, the commissioner appointed as appraisers of the value of said land, Alonzo Maria Trecierra and Juan Rios Can-

delario, the marker and one of the measurers, after qualifying they appraised the five square leagues at four hundred dollars, Rodriguez, the petitioner, being satisfied, but stated, "he would desire to ask some equitable grace in this particular in view of the fact that on account of the danger from savages, it will be very difficult for some years to realize settlement and cultivation of said lands for the just and notorious reasons set forth in his petition of registry" (R. 11).

On the same day the measurement and valuation being concluded the commissioner ordered that thirty public offers of sale (pregones) be made, promulgating the same by official communication to the Senior Judge of the first instance of Guadalupe del Altar, to the end that he might give notice of said public sale in the pueblos of the district, and note is made that such official communication was sent as directed (R. 11 & 12).

As to whether there was ever any advertisement or *pregon* in the district in which the land was situated does not appear. Articles 75 and 76 of the law of the State of Sonora of 11th of July, 1834, being the same referred to in the preamble to the testimonio, require the proclamations of sale (pregones) of land to be made in the town to the jurisdiction of which they belong, and in case proclamation cannot be made in such place, then in any other, provided it is not out-

side of the respective district (Reynolds. 191).

It is evident from the certificate (R. 11 & 12), that Guadalupe del Altar was the proper place and nothing appears by return or report of the judge of the first instance that proclamations were made as required by law which is recited as authority for the proceedings.

On March 9th, 1838, at the City of Arispe, the Capital of the alleged State, the first of the thirty advertisements (pregones) was made and the form is set out in extenso, then follows twenty-nine minutes repeating the first offer, and are concluded on April 7th, 1838 (R. 12-15).

I wish to call attention to the fact that in the public advertisements soliciting bidders other than Rodriguez, no mention is made of the fact that Rodriguez had in his petition imposed a condition upon which he would purchase the property, to-wit:

> "That the registry that I now make is under the condition that the settlement and occupation of the said vacant lands by me shall be when the notorious condition and circumstances of the region of the country in which vacant lands are situated may permit the same to be done, etc.," (R. 8.)

Other persons who might desire to bid for the land were not placed upon equal terms with Rodriguez nor even notified that immediate possession would not be required as was the law and custom; nor does the ad-

vertisement release Rodriguez from the usual requirements in such cases.

On April 7th, no purchaser having appeared, the expediente was transmitted to the Treasurer-General of the State that final proceedings might be taken. (R. 15).

On the same day it was referred to the Promoter-Fiscal of the public treasury (R. 16).

On April 8th, the Promoter-Fiscal of the treasury of the State made his report finding the proceedings regular, and that at the thirty public offers of sale no purchasers appeared, and he further finds, "neither does it appear that any interested party appeared from the District of Guadalupe del Altar, to which Judge of the first instance the Commissioner gave at the proper notice of the proceedings and sale."

He further finds that the sale of five leagues of land at the junction of the Gila and Colorado rivers for four hundred dollars will be of great benefit to the public treasury and promote the settlement of Sonora, and that the enterprise of the Señor Don Fernando Rodriguez was laudable and worthy of all protection, for the reasons set forth in his petition, it being well known that such causes were the foundation of all grants made by the Spanish government in the desert lands of Sonora.

In view of which facts, he recommends that Rodri-

guez be admitted to a composition with the treasury of the soverign state for said land, under the condition of settling the same when the circumstances would permit the same to be done, and recommends that the three public offers of sale (almonedas) be made, and when the purchase money should be paid into the treasury that title be issued (R. 16 & 17).

On the same day order was made for the three offers of sale (R. 17).

On the same day at Arispe the gentlemen composing the board of sales (junta de almonedas) having met, being the treasurer of the state, the comptroller, Jose Justo Milla, the judge of the first instance of the district of Arispe, Francisco Mendoza, and the administrator of the revenues of said district, Jose Carrillo, [redacted] the first offer was made by auctioneer Florencio Baldizan and no bidder appearing the proceedings for the day were closed (R. 17).

On the following day the second offer was made and no bidder appeared (R. 18).

On the following and third day, being April 10th, 1838, the third offer was made and the property sold to Rodriguez for four hundred dollars (R. 18).

It will be noticed in offering the property to the public for sale, no notice is given that possession need not be taken until the notorious conditions and circumstances of the country would permit, hence Señor

Don Fernando Rodriguez was obtaining material and valuable advantage over others who might be honest bidders for the property and which was concealed in his petition and the very friendly report of the Promoter-Fiscal.

On April 10th, 1838, Rodriguez was notified and promised to pay the purchase money, $400.00, and $30.00 for the title (R. 18 & 19).

Following is a certificate by Jose Justo Milla that Rodriguez had paid the purchase money and that entry thereof had been made on folio 18 of the "Libro Manuel de Cargo y Data," also certificate that on folio 19 of same book appears $6.00 paid by Rodriguez, tax on sale (R. 19).

This concludes the *expediente* as it remains on file in the office of the Treasurer-General of the State of Sonora at the present time.

The instrument offered in evidence is erroneously called the *testimonio*, when it should be designated as the *titulo* or *grant* (patent).

The *expediente* is original in all its parts and should always remain on file in the archives. No preamble nor granting clause in case of land is ever attached to it.

The *testimonio* is the first copy of the *expediente*. It is that copy given to a party. In case of land, it is always preceded by a preamble, citing the laws under

which it is made, and is followed by the granting clause or grant signed by the granting officer. The preamble and grant and the signature of the granting officer are the only parts of it that are original. The instrument so made up is given to the grantee as evidence of title.

The only record of the issuance of the grant document is the note made in a book kept for that purpose. This, strictly speaking, is the Toma de Razon, the taking of a note or memorandum. As applied to land grants, it is a note or memorandum of the issuance of the *grant* or *final* title entered in a book provided for that purpose; this note contains such memoranda as will identify the grantee, date of grant and property granted.

The fact that such record has been made in the proper book should be endorsed on the grant document, and in every case where such record has actually been made, the endorsement gives the folio of the book where it is to be found. In *no instance* where granting documents bear such endorsements as the present can the Toma de Razon of the same be found anywhere in the book kept for that purpose.

On April 12, 1838, the granting document or patent was issued by Jose Justo Milla as auditor of the general treasury of the State.

He recites the *expediente* was concluded with all the formalities required by law and the supreme orders in

relation thereto, the original *expediente* remaining in the custody of the office of the treasury as perpetual testimony. He then recites:

> "Wherefore in the exercise of the faculties conceded to me by the laws, decrees and regulations and the superior existing orders in relation to lands, by these presents, and in the name of the free, independent sovereign State of Sonora, as well as that of the august Mexican nation, I concede and confer upon in due form of law, the Señor Don Fernando Rodriguez," * * * *
>
> "The five square leagues, and adjudicate the same to him under the conditions which have been admitted as equitable and just by interested party, the Senor Don Fernando Rodriguez, that is, that he shall settle and cultivate said lands so soon as the circumstances surrounding that distant and desert portion of the State may permit him to do so, in view of the imminent risk and danger there is on account of the savages, but when the said land shall once be settled and cultivated, they shall be kept in condition, and that they shall not be unoccupied and abandoned for any time; and if the same shall be abandoned for the space of three consecutive years, and anyone else denounce said lands, in that event, after the necessary proceedings, they shall be adjudicated anew to the highest bidder; excepting as is just, those years in which the abandonment was occasioned by the invasion of the enemies, and this only for the time that this condition of things exists," etc (R. 20 & 21).

This granting document bears the following indorsement:

"'*This title remains registered*' in the corresponding book" *Rubric.*

(R. 21.)

This endorsement is untrue; the corresponding book for years from 1831 to 1849 exists and was found in the archives at Hermosillo (R. 85), but at the place by date where the note should appear, it is wanting, although we find notes of grants issued on April 10, 1838, and April 29, 1838, and the entry of this grant should come between these two. The only logical and reasonable conclusion to which I can arrive, is that this endorsement was made after the date it purports and after the entries in the book had been made, so that note ~~was~~ could not be made in the proper place, and this accounts for the fact that the endorsement does not give the folio of the book as it should. This entry, we contend, is the only record of the grant proper, hence the same was not duly and regularly recorded as required by the sixth article of the treaty of Mesilla.

The next endorsement found on the grant document is the certificate that the fee of thirty dollars for issuance of title had been paid, and it will be noted that this certificate does give the folio of the book when the same was charged (R. 21).

On April 13, 1838, the same was approved by the

Governor of the State, Leonardo Escalante (R. 21). What vitality this approval can give, I am unable to determine, as the Governor under the laws of the republic had nothing to do with the issuance of titles to lands at that date, and under the laws of the *extinct* State of Sonora he was equally without power or authority.

A certificate by Encinas, alcalde, dated March 27th, 1838, is to the effect that Rodriguez had sufficient means to stock and cultivate the land (R. 25 and 26, also 36 and 37).

A document so made up is the testimonio and grant delivered to the party as evidence of title.

The document, I admit, is in substantially the same form as others during that period with the exceptions to which I shall call attention.

It will be understood the grant attached to the testimonio is original and should be the only original document so attached, others being copies of the *expediente*.

There are several documents and communications relied upon by claimant.

On December 1st, 1840, the Chief of the Treasury of the nation, replying to a number of communications from Jose Maria Mendoza, Superior Chief of the Treasury of the Department of Sonora, in relation to vacant lands and their status, stated that until by legislation all doubts should be removed, land matters

should be determined in the junta de hacienda (board of the treasury). Further replying to the communication of February 23, 1839, caution is given to comply with Article 74 of the laws of April 17th and December 7, 1837.

Further caution is given as to the controversy between the government and the national Bank over the mortgage and instructing a suspension of delivery of lands to the agent of the bank and if some had been delivered he should recover the same (R. 37 & 38).

If the vacant lands in the State of Sonora belonged to the State in 1838, they belonged to it in 1840, and I cannot understand how this communication directed to Jose Maria Mendoza, a Departmental officer, can inure to the benefit of a State title when that State had been extinct since 1836. The other communication, dated June 6th, 1847, is from the same Jose Maria Mendoza, styling himself Commissary General of the State of Sonora, in relation to this particular grant, asking the Minister of State and Land Office of the Republic to bring the matter to the knowledge of the President of the Republic, and accompanied said communication with the testimonio which had been presented by Rodriguez (R. 39.)

If this communication is genuine, I do not understand how the testimonio is now found in the possession of these claimants and no action upon it by any of

the federal officers. The evident purpose of the transmission of the testimonio at Rodriguez' request in 1847 to the national government was to obtain from it some approval or recognition of his grant. The communication is dated June 6th, 1847. The document presented in evidence is a certified copy of the alleged original communication made in the fifties; the last figure of the date is torn, and the certificate also states that this certificate and copy extended at Ures, Capital of the State of Sonora, at the request of Rodriguez.

What was Rodriguez troubling himself for when he had delivered all the papers to Juan Robinson in 1847 and had no further interest in the property? Why the papers and documents are silent as to approval or recognition after so many attempts does not fully appear. Juan Robinson, in his testimony, makes no mention of any attempt upon his part, or by his authority, to have any action taken in relation to this grant by the Mexican nation. Juan Robinson's testimony is silent as to the date in 1847 when Rodriguez transferred him the property by the delivery of all the title papers.

The next certificate, dated the 15th of January, 1858, is also by Mendoza, at this time pensioned commissary-general of the State of Sonora, and Florencio Trejo (R. 39 and 40).

These men certified at that date that the *expediente*

in this case was found by them in the archives at Arispe and that the signatures were genuine. There is also attached another certificate dated September 10th, 1858, by the governor and secretary, that these signatures were genuine (R. 40).

As to this I propound the question, Who procured these certificates at the various dates they were and are alleged to have been made?

Juan A. Robinson says nothing about them in his testimony, and according to that he was in possession of the *testimonio and grant* from 1847 and was the only person having any interest in the property.

There is another certificate by Jose Aguilar, dated June 8th, 1857, stating that the signatures to the *expediente* are genuine and that the grant is a legal grant (R. 40 and 41).

I do not understand who procured this certificate in 1859 for Mr. Juan A. Robinson, without his knowledge or consent. This grant with these various certificates seems to have been of great concern to Jose Maria Mendoza and a few of his confreres from 1840 to 1858, although the owner of the grant from 1847 to 1874 (Robinson) must have been ignorant of these proceedings or he would have mentioned some of them in his deposition. I shall take occasion later on to call attention to the many inconsistencies in these title papers going to the extent of good faith, although I now ad-

mit that the condition of the record tends strongly to prove the genuineness of the signatures of the various persons who purport to have signed the same, but does not entirely overthrow the internal evidence of antedating.

A large amount of oral testimony was taken by the claimant and the government as to the genuiness of the signatures of Jose Justo Milla and various others who purport to have acted as officials.

A large amount of testimony was taken to show that the proceedings leading up to the grant are in the usual form. I admit, on behalf of the United States, that the general form is substantially like those used long prior to the date of the grant, 1838, and for some time after.

Considerable testimony was taken by claimant to show that the *expediente* found in the archives was the only and proper record of the *issuance* of the *grant*, and in order to accomplish such a probative result, distinguished lawyers and officials were examined quite at length as to their knowledge of the manner of making grants, the legal effect of various official acts and the political history of the country, which testimony when compared carefully with the title papers and *expediente* and alleged correspondence in this case and all others from the date of the regime of the intendentes

to the present time, will demonstrate how inaccurate and unreliable is such testimony.

The deposition of Juan A. Robinson, to whom Rodriguez sold the property in 1847 and delivered the title papers, is to be found in the record (pp. 61 to 66)—and to this entire deposition we call especial attention.

He testified in the year 1880 and must at that time have had more intimate and accurate knowledge of everything connected with the claim than anyone now living.

He was 78 years of age and had resided at Guaymas, State of Sonora from 1821 to 1861 and occasionally from 1861 to 1869; was U. S. consul at Guaymas from 1842 to 1850 or '51. Was personally acquainted with Fernando Rodriguez from *1853* until his death in 1865.

(NOTE.—It is contended the date 1853 is a clerical error, and such is likely the case.)

Was aware of the fact of his obtaining a grant at the junction of the Gila and Colorado rivers from the authorities of Sonora in the year 1858. The extent of the grant was five leagues or sitios. He purchased this grant from Rodriguez in 1847 in the settlement of commercial transactions between them, but never received any deed or conveyance to the same from Rodriguez, for the reason that all of the title papers had been delivered to him, and believing Rodriguez to be an honorable man, he neglected the matter. In the year 1873, however, he did obtain from the heirs of Rodri-

guez a conveyance to the same. At the time of the sale Rodriguez handed over the original title papers obtained from Sonora authorities, and the same were held by him until 1874, when he turned the same over to the Colorado Commercial and Land Co.

He testified that Rodriguez assured him that the papers were gotten up in conformity with the Mexican laws and were full titles and covered in every respect the ranch of El Paso de los Algodones.

The witness then testified in substance, with respect to the possession of the property, that on account of the danger arising from the barbarous Apache Indians, he found it impossible to take possession of the same, although he made liberal offers to parties to go there and he only succeeded finally by offering handsome compensation to settlers who supplied the U. S. military stations in Arizona and southern California, to locate their establishments on the property, and by that means a nucleus was formed for the present town of Yuma. He said he never went into possession of the property himself, "the settlers taking possession in my stead, I made it a consideration for them to go there. I gave them a part of the property; I would rather not say any more than that I know they went there and held the property."

Witness further testified that he was aware that Rodriguez made several attempts to occupy the land

before selling to him, but was compelled to abandon these attempts on account of the hostilities of the Indians. He says that possession was taken after the Gadsden purchase, and soon after troops were sent there and possession was held up to the time of the sale to the corporation in 1874. He says that from the very moment the troops went there the settlers took possession in his name and have remained there ever since.

On cross-examination he stated that the country at the junction of the Gila and Colorado rivers was of great importance on account of the geographical position and considered the head of navigation from the Gulf of California and likely to become a point of export of the metals and mines in that vicinity, which were reported fabulously rich.

At the time that the grant was made to Rodriquez the Indians were on the war-path, making it impossible for white people, except with heavy escorts of troops, to remain for any time in the vicinity. Various attempts were made by the owners, but they were invariably driven back, several times with loss of life.

Rodriguez, at the time of the purchase of this grant in 1838, was considered very rich. Witness was not aware that Rodriguez was the owner of any other grant of land from the state of Sonora, and said that he did not think he had any other grant. He further states that previous to 1847 he made various attempts to

equip several bodies of rancheros and vaqueros, and dispatched them to take possession of the same, but they never reached the grant, returning a report that they had met a large body of savages and were unable to proceed without a sufficient force of troops.

The testimony of the other witness for claimant was to the effect that the documents were genuine and that the *expediente* or matrix is the record of the grant.

Aguilar, the present state treasurer, testified, in identifying the book called the "Toma de Razon" of grants, that the book was the register of grants of land (R. 71.), containing registry of grants issued from 1831 to 1849 (R. 85).

I contend that this book is not only the proper, but the only place, where official record is made of the issuance of the granting document. The *expediente* is the record of the preliminary proceedings, but not of the grant.

The remainder of the testimony consists of legal opinions, which I will notice in argument. A large number of laws and decrees are printed in the record and will be referred to in the brief and argument.

BRIEF AND ARGUMENT.

In presenting this case, I wish at the outset to insist that the act of Congress, creating and conferring jurisdiction upon the court of Private Land Claims, is materially different from any other private land claim act,

and is quite as worthy of study as the Spanish and Mexican laws applicable to land titles presented for adjudication. However liberal in construing rights protected by treaty stipulations it is our duty to be, still the judiciary should go no further than it appears Congress intended, I have no doubt every lawyer, who has had occasion to try a case under this act, feels he could draft one more in harmony with the true spirit of the treaty, and much more equitable in all its provisions than the present From the inception of the litigation before the lower Court to the present, strong and persistent effort has been made, and in my opinion not always unsuccessful, to induce the Court of Private Land Claims to ignore the limitations and restrictions upon, as well as legal sufficiency of proof which would justify, a judgment of confirmation in any case.

This case is a fair illustration of the breaking down of barriers with which Congress in its wisdom and judgment has seen proper to surround the Court in permitting it to enforce political equities and obligations.

Under the Spanish and Mexican systems of land tenure possession was necessary to an investure of title, so as to transfer any vested rights to the grantee against the King or government.

It is admitted that no possession was taken of this property until after the country was ceded to the

United States by the treaty of Mesilla (Gadsden purchase).

The hasty and unsatisfactory manner in which Juan Robinson took possession, according to his testimony (R. 63 and 64), is calculated to lead one to a conclusion, that the settlers who took possession in his stead, did so under the supposed right of the United States, and not by the permissive authority of the unknown owner, Juan Robirson, who had no conveyance until 1874. I doubt very much whether the settlers following the wake of the establishment of the military post on the frontier, ever heard of Mr. Robinson during their natural lives. It does appear that no conveyance was ever executed in favor of the settlers establishing the town of Yuma until January 31st, 1892, a few days before the filing of the petition in this case.

Rodriguez in his application for the land stated that he would take the property conditionally, viz:

> "That the settlement and occupation of the said vacant lands by me shall be, when the notorious condition and circumstances of the region of country, in which said vacant lands are situated may permit the same to be done, etc." (R. 8).

The final grant or patent also contains such reservation in favor of Rodriguez. (R. 20).

The land was pettioned for and sold for a specific purpose and use, and there entered into the consideration for all dispositons of the public lands, the actual

occupancy of the property at least within a reasonable time. The value was fixed very low with this object in view.

Opinion of Promotor-Fiscal. (R. 16).

The officers were not permitted by law to sell lands except for specific uses, nor am I aware of any law, either Spanish or Mexican, which authorized the local officials to waive the use and occupation of the property which was part consideration for the grant; in fact the policy was firmly established under Spain and continued after independence, that the real and most valuable consideration passing to the government was the settlement and reduction of the vast areas of vacant lands to useful purposes; these title papers clearly recognize this policy and requirement, as do all such documents which I have had occasion to examine, either ancient or modern. If the sale was unconditional, then why make the reservation in favor of Rodriguez?

The conditions of the country and the difficulties of complying with the requirement of possession and occupation were admittedly well known, and can furnish no excuse for failure to take possession for sixteen years prior to the cession and not until after the United States made the same possible by the intervention of its army.

De Vilemont vs. U. S., 13 How., 261.
Boisdore's Heirs, 11 How., 63-94, 95.

Under Spain and Mexico possession was necessary to the investure of title. The rights of the claimants must be adjudicated as of the date of the treaty, and no possessory rights acquired subsequent to the treaty can inure to the benefit of a Spanish or Mexican title protected by treaty stipulation. The United States agreed to recognize such rights only as existed at the time and which were strong enough to justify the claimant in demanding recognition by the former government.

I can not think that had Rodriguez or Juan Robinson applied to the department of public works of Mexico on December 30th, 1853, or June 30th, 1854, for a recognition of this title and it was made to appear that no possession had been taken, it would have received any serious consideration, nor do I believe equity and good conscience would have required it.

It is contended by counsel that possession was not necessarily an element in the investure of title, and that it was not one of the conditions imposed or entering into the consideration for the grant; but if so, it was a condition subsequent and would not defeat the vested title, except in a proceeding for that purpose. I shall not discuss this question in its general sense, but only as the 13th section of the act makes it a neces-

sary element in establishing the right to have the decree of the Court at all.

Section 13 provides:

> "That all the foregoing proceedings and rights shall be conducted and decided subject to the following provisions as well as to the other provisions of this act, namely: Eighth. No concession, grant or other authority to acquire land made upon a condition or requirement, either antecedent or subsequent, shall be admitted or confirmed, unless it shall appear that every such condition and requirement was performed within the time and manner stated, in any such concession, grant or other authority to acquire land."

If possession was necessary to the investure of title, or was necessary in order to justify Rodriguez in calling upon the Mexican government for recognition of the title, then I contend before the Court can confirm the title, it must appear possession was taken prior to the treaty.

In passing upon the requirement of the act, it appears to me that section thirteen was intended to and does apply with equal force to grants coming under section eight as well as to those within section six. And the question as to whether the land was subject to denouncement for failure to comply with conditions subsequent in their nature is immaterial, and the law relating to forfeiture for failure to comply with such condition has no application. The act requires that

claimant shall make it affirmatively appear that all conditions had been performed before the Court could pass a decree in his favor, and I stand on this question simply where Congress has seen proper to place a limit upon the power of the Court. That possession was a condition, I care not whether antecedent or subsequent, clearly appears from the petition, opinion of Promotor-Fiscal, and grant. The power of the local officials to waive this condition, I can find no authority for.

No possession was taken for sixteen years and we find, upon the change of sovereignty over the country, the land vacant, uninhabited, uncultivated and in no better condition than on April 12, 1838, the date of the grant; I am, therefore, forced to the conclusion that no equity, in the broadest sense, existed at the date of the treaty by virtue of possession in good faith or otherwise, and the justice of the eighth subdivision of section thirteen is fairly illustrated by this case.

Possession has always been carefully looked to in determining good faith and the force which the equities, if any, should receive.

The grant in this case was not recorded as required by the sixth article of the treaty.

It is true that the *expediente* is now found on file in the proper archives, but I deny that the it is the grant or the record thereof.

Mr. Victor Aguilar, the present treasurer of the State of Sonora, and chief custodian of the archives, testified (R. 71), that he had no record in his office that would show who was treasurer general of the State in 1838; but in 1839 Jose Maria Mendoza was treasurer general, in 1837 the treasurers general were Jose María Mendoza and Ignacio Trellez. He also testified that Fernando Rodriguez obtained on the same day, April 12th, 1838, two grants, "Paso de los Algodones," for five leagues and "La Punta del Sargento" for ten leagues

The witness was shown a book, which he admitted was a record of his office and said it was the "Toma de Razon" or register of the titles of grant to land. (R. 71). He examined it for the year 1838, and said he could find no record of either the Algodones or Sargento grants made to Rodriguez on April 12th, 1838. (R. 71.)

On page 75 of the record, in reply to questions by plaintiff's counsel, he testified:

> "Q. Is not a matrix and expediente one and the same thing?
>
> A. Matrix is the original paper that remains in the office, while an expediente is the *copy* of any paper."

Mr. Aguilar must have over-reached himself in interpreting what counsel was desiring to prove. The terms used, *matrix* and *expediente*, are one and the same

thing and it is an original and remains on file in the proper office.

"Q. Is not the matrix of a grant the primary record of the same?

A. Yes, Sir."

If the *original grant* is delivered to the grantee, with a testimonio of the preliminary proceedings (*expediente*) attached, thus forming the *titulo*, how can the "*matrix*" be the record when it is in possession of the grantee as evidence of title? This is a fair sample of all the testimony in the case as to the record of this grant. The record book (Toma de Razon) exists for the period 1831 to 1849 (R. 84 & 85).

It appears the record book does contain three grants issued during the month of April 1838 as follows:

April 10, Iusibampo.

April 10, Pedro del Tempo.

April 29, Lajitas y Palos Cramos.

It appears between January 31st and July 30th, 1838, twenty-one *grants* were recorded in this book. The Algodones and the Sargento grants both made to Rodriguez on April 12, 1838, do not appear to have been registered, although the proper place for them would have been between the record of the Pedro del Tempo and Lajitas y Palos Cramos grants (R. 85).

I am firmly convinced, had this grant been registered in the "proper book" on April 12, 1838, it would now appear in proof in this record as registered in

1838, between that of Pedro del Tempo, April 10th, and Lajitas y Palos Cramos, April 29. I am still more firmly convinced, had such a state of the archives existed, this Court would not now be burdened with the contention that the grant was not recorded as required by the sixth article of the treaty.

The endorsement on the grant in this case is untrue. In the case of U. S. vs. Vallejo, 1 Black 549, it is held, a false note of the record of a grant casts a suspicion on the whole, and is sufficient to justify a rejection of the same.

This was under the Guadalupe Hidalgo treaty, and it seems to me, to be going very far to hold, that the actual proof in this case complies with the sixtn article of the Mesilla treaty, or that this grant can be fairly brought within its terms.

In the case of the U. S. vs. Osio, 23 How., 273, 279, the Court says:

> "Adjudications of land titles were required by the Mexican law to be recorded. That requirement, however, was regarded as fulfilled, according to the practice in California, when a short entry was made in a book, kept for the purpose, specifying the number of the *expediente*, date of the grant, a brief description of the land granted, and the name of the person to whom the grant was issued. In this case, there is a certificate appearing at the bottom of the instrument to the effect that such entry had been made, but it is

> wholly unsupported by the proof of the existence of such record."

In the case at bar the record exists and the note on the grant is found to be untrue.

In U. S. vs. Teschmaker et al, 22 How., (392,405) the Court says:

> "There is no record of the title in the proper book shown in the case, nor exists in fact, as it is understood this book of records exists for the years 1844 and 1845, and no record is there found. The memorandum, therefore, at the foot of the grant by Arce, the secretary, 'note has been made of this decree in proper book on folio 4' is untrue."

It is apparent that the controversies arising in the litigation under the California Act, as to what was sufficient proof to justify a recognition of title under the treaty of Guadalupe Hidalgo, and especially the repeated contests as to the genuiness of various documents produced from private hands, induced Mr. Gadsden to guard by stipulation against their repetition, and require a complete record, such as ought to have been kept by Mexico and Sonora, and such as was really intended by the treaty of Guadalupe Hidalgo.

I am convinced, the treaty of Guadalupe Hidalgo and the adjudications thereunder really intended that all titles, either perfect or imperfect, should be verified by the records; if the record was lost or destroyed, that fact should appear in proof;

that the particular title, or papers upon which title was asked to be issued were genuine; that the proper records of the same had been made or kept; and that they were lost or destroyed. Proof of loss or destruction of records generally, without any particular connection being shown between the title papers presented and the lost records was not considered sufficient.

The cause of U. S. vs. Cambuston, 20 How., 59, was a fair construction of the requirements under the treaty and law, and in many instances, I fear, the adjudications under the present act have not adhered to these rules or the record status of the present title, as well as many others coming before this Court on appeal, would have received more careful consideration below.

I am compelled to assume the language of the treaty of Mesilla is no broader than was intended by the parties. I am still further led to the conclusion that the record intended was such as was actually kept for the information of the government of Mexico, and which was then and is now recognized as the proper register of the same, that is, the *expediente* on file in the office, and the note made of the issuance of the grant in the book kept for that purpose. The absence of either must be fully accounted for or recognition should not be given under the treaty.

If this book was not the proper place for the record

of the grant or patent, why do we find twenty-one grants registered between January 31st and July 30th, 1838, and three in the month of April of the same year, and the two grants to Rodriguez which were made April 12, 1838, both bearing endorsements that "*this title remains registered in the corresponding book*," not appearing?

To my mind it is not sufficient answer to this, for the experts to undertake to bolster up false endorsements of notes of grants in "proper books" by testifying the *expediente* is the proper record of the grant, or that an endorsement on the *expediente* that title had been issued thereon, is the proper record required by the treaty. It is perfectly apparent the person who made the endorsement on the original grant or patent, as follows: "*This title remains registered in the corresponding book*," did not understand that the *expediente* or a note made on it "that title had been issued," was sufficient record of the grant or even the proper record.

Bearing in mind that no possession, juridicial or otherwise, was taken prior to the treaty, and such material and controlling endorsement being found to be false, together with the other defects in the *expediente* to which attention is called in the statement, it leaves grave doubts in my mind whether the *grant* was not is-

sued subsequent to April 12, 1838, although every signature may be genuine.

Under the case of U. S. vs. Teschmaker, 22 How., 392, it seems to me this grant should be rejected, leaving out of consideration the mandatory language of the sixth article of the Mesilla treaty.

STATE GRANTS.

The states of the Mexican Republic were not at any time owners of the vacant public lands within their boundaries and never possessed the unrestricted right of disposition of the same.

The foregoing proposition is based upon two grounds, namely:

First. The supreme executive of the government, possessed of executive and legislative powers, declared by a public order or decree on November 25, 1853, pending negotiations between Mr. Gadsden and the representatives of that government, which resulted in the Treaty of Mesilla (commonly known as the Gadsden Purchase), signed on December 30, 1853, and ratifications exchanged on June 30, 1854, that "the public lands, as the exclusive property of the Nation, never could have been alienated under any title by virtue of decrees, orders and enactments of the Legislatures, governments or local authorities of the States and Territories of the Republic."

Second. The title to the vacant lands prior to inde-

pendence was vested in the King of Spain, and upon independence was vested in the Empire, and then in the Republic, and was never transferred to the States. The only right to dispose of any of said lands by the States emanated from the Republic under and by virtue of what is known as the Colonization Law of August 18, 1824.

As to the first proposition, I submit that whatever may have been the exact status of titles to vacant public lands between the States and national government, or the contentions, controversies and revolutions arising therefrom, the declaration and action of that government upon the question during the negotiations for the treaty, should preclude any investigation of the subject by this government. To us, it is immaterial whether the national government, from a judicial standpoint, was right or wrong; its solemn declaration made at the time by public decree as to the real status of property situated within the States, must be taken as absolutely correct. We cannot look behind the declarations and actions of the treaty-making power, which is not restricted or limited by any fundamental law, and encumber ourselves with the decision of their past domestic bickerings, or the justice of claims that subjects, either individual or corporate, may assert or contend that they have against the government. It alone is authorized to speak for and bind them, and in an in-

ternational sense, the action of that government, whether right or wrong, must be binding upon its subjects who are merged in the great political and international agent, to-wit, the treaty-making power. I may stop to remark that I know of no provision of the Mexican Constitution or Mexican law that authorizes the treaty-making power to dismember the State of Sonora and transfer political dominion over the same to the United States, without its consent. Yet, such transfer did take place and political dominion has been exercised by this government ever since 1853. The exercise of this power can only be justified by great political necessities, to which the constitution itself must often give way. If Santa Anna's usurping and discreditable administration could accomplish this result and we eagerly and designedly reaped the fruits of the same, it surely can not be contended that his declarations, lawfully and properly made, as to the status of the title of vacant public lands within that territory, are now to be questioned by any branch of this government.

In order that we may understand exactly what Santa Anna did in this respect, I quote all of the orders and decrees made on this subject, including the repeal and denunciation of his acts by the succeeding governments:

Decree of November 25th, 1853.

Annuls Sales of Lands Made by States, etc.

Antonio Lopez de Santa-Anna, etc.

Article 1. It is declared that the public lands,

as the exclusive property of the Nation, never could have been alienated under any title by virtue of decrees, orders and enactments of the Legislatures, governments or local authorities of the States and Territories of the Republic.

Article 2. Consequently, it is also declared that the sales, cessions or any other class of alienations of said public lands that have been made without the express order and approval of the general powers, in the manner prescribed by the laws, are null and of no value or effect.

3. The officials, authorities and employees, upon whom devolves the execution of this decree, shall proceed, as soon as they receive it to recover and take possession in the name of the Nation, of the lands comprehended in the provisions of Article 1, and that may be in possession of corporations or private individuals, whatever may be their prerogatives or position.

4. The judicial, civil or administrative authorities shall admit no claim of any kind, nor petitions whose purpose is to obtain indemnification from the Public Treasury for the damages the unlawful holders or owners may allege, under the provisions of the preceding article; and they shall preserve their right only against the persons from whom they have the lands they are now compelled to return.

Decree of July 7th, 1854.

Annuls sales of lands made by States, Departments, etc.

Antonio Lopez de Santa-Anna, etc.

Article 1. The titles of all the alienations of

public lands made in the Territory of the Republic from September, 1821, till date, whether by the general authorities or by those of the extinguished States and Departments, shall be submitted to the revision of the Supreme Government without which they shall have no value and shall constitute no right of property.

2. To this end the Ministry of Public Works shall appoint commissioners, who may be the agents it now has in all the Departments and Territories, to whom the proprietors of public lands, or those who represent them, shall be obligated to present the titles of the acquisition thereof, within the term of six months, counted from the date on which this law may be published in each capital. There shall be admitted, for the purpose of the present decree, not only the original documents, but also, in default thereof, copies thereof authenticated and conformable to the law, and besides compared by the commission that may receive them. Proprietors who do not comply with the obligations which are imposed on them by this and the preceding article shall be considered as detainers without any title. * * * *

5. The alienations of public lands, of whatever nature they be, that have been made by the authorities and officials of the departments without the knowledge and approval of the general government, during the epoch when the Central System was in force in the Republic, are void.

6. Those made by said authorities in the epochs of the extinguished Federations are likewise void; *provided*, they were not made for the purpose of extending and promoting colonization,

which was the purpose proposed by the law of August 18th, 1824.

7. Grants or sales of lands made to private individuals, companies or corporations, under the express condition of colonizing them, and the holders of which have not complied therewith in the terms stipulated, are declared to be of no value.

8. The alienations made by the States or Departments and declared void by the three preceding articles may, nevertheless, hold if the holders of the lands obtain the consent of the Supreme Goverment, and pay into the public treasury what it considers proper to exact as the value of the land; *provided*, they apply for this ratification within the time designated in Article 2, in which case alone there shall be no further proceedings to annoy or jeopardize them. * * *

14. The law of November 25th of last year remains in force, in so far as it is not in conflict with the present decree.

Decree of August 20, 1855.

Extends Time for Presentation of Title for Confirmation.

Martin Carrera, General of Division, President *ad interim*, etc.

Only Article. In consideration of the difficulties that have arisen in various parts of the Republic, in consequence of the political movement that has interrupted the relations of the Capital with several of the Departments, and has prevented the holders of public lands from presenting their titles; and in attention to the fact

that in various cases it has been difficult for them to promptly get together all the documents necessary to legalize their respective acquisition, the time set in Article 2 of the law of July 7th, 1854, is extended another six months, which will end January 31st, next year, for the owners of public lands to present, for the revision of the Government, the titles to the lands they have acquired since the month of September, 1821.

Decree of December 3rd, 1855.

Repeals Santa-Anna Decrees.

Juan Alvarez, President ad-interim, etc.

Article 1. The decrees of November 25th, 1853, and July 7th, 1854, which submitted to the revision and approval of the Supreme Government the grants or alienations of public lands made by the local governments of the States or Departments and Territories of the Republic from September, 1821, to that date, are repealed in all their parts.

2. Consequently all the titles issued during that period by the Superior Authorities of the States or Territories under the Federal System, by virtue of their lawful faculties, or by those of the Departments or Territories, under the Central System, with express authorization or consent of the Supreme Government for the acquisition of said lands, all in conformity with the existing laws for the grant or alienation respectively, shall for all time be good and valid, as well as those of any other property lawfully acquired, and in no case can they be subjected to new revision or ratification on the part of the government.

3. The alienations of public lands that have been made by the authorities of the States or Departments and Territories without the requisites referred to in the preceding article and in contravention of the provisions of Article 4 of the law enacted by the General Congress on the 18th of August, 1824, are void and of no value, and the holders of that class of lands are subject to the penalties established by existing laws in the Republic for those who acquire property in an unlawful and fraudulent manner, unless they promptly obtain the approval of the Supreme Government, to which they shall apply therefor through the Department of Public Works."

4. All titles of acquisition of public lands which, under the law of July 7th, 1854, have been presented to the Department of Public Works for their ratification, under the provisions of articles 5 to 8 of said law, shall be returned to their respective owners without requiring payment of any kind of them. With regard to those in the case stated in Article 3, proceedings shall be taken in the manner provided for in the same.

5. The grants or sales of public lands made by competent authority and under the laws in force in their case, with the express obligation on the part of the new holders to colonize them in a given time, without their having complied therewith in the manner stipulated, are for that reason alone void and of no value, and said lands shall again become the property of the Nation.

* * * * * * * * *

Decree of October 16th, 1856.

Nullifies Certain Decrees of Santa-Anna.

Ignacio Comonfort, substitute President, etc.

Article 1. The decrees of November 25th, 1853, and July 7th, 1854, are void.

2. Antonio Lopez de Santa-Anna and the Ministers who took part in their approval and promulgation are responsible, with their property, for the damages they have caused.

3. The Governors of the departments are likewise responsible, with their property, for the damages they have caused in the execution of the provisions on public lands, having exceeded the limits laid down in the several laws.

The foregoing laws will indicate the policy pursued by Santa Anna before the treaty and subsequent thereto, as well as the policy pursued in respect to this matter by those who succeeded him. An undefined controversy as to the title of the vacant lands had existed between the States and the nation from independence, and particularly on the part of the States distant from the Federal District. Whatever may have been the legal status of the title to the public lands, the government of which Santa Anna was the head and Dictator, was recognized by this government in making the treaty, and it does not become us to question his authority or to inquire into the manner of his acquiring it. The fundamental laws of the country, in conferring the right to treat with foreign nations, did

not restrict or limit the subject thereof. It will be understood that the rules governing the transfer of title to the public land from a nation to an individual, or the transfer of the same as between individuals, are very different from those to be applied when we come to consider the transfer of property as between two independent sovereignties. As suggested before, the right to dismember any portion of the Mexican Republic by the treaty-making power was not restricted or limited, and strange as it may seem, the constitution of the United States in conferring the treaty-making power upon the President and Senate places no express limitation upon them, nor does it restrict the right of disposition of any portion over which the government exercises political dominion, although it is vigorously contended that a dismemberment of a State without its consent is contrary to the spirit of our form of government. The general proposition being true, the treaty-making power being the only one to which we are to look, its representations and admissions will bind its subjects, although in a controversy between the subject and the sovereign in its local tribunals, the subject might be protected, and any wrongs suffered by him redressed.

It is true that these declarations made by the Mexican Government were not embodied in the treaty itself, but the treaty was negotiated and executed with

such declarations as the law of the country affecting the title to the property which we are obtaining. And although subsequently repealed and nullified, the lands came to us with the status of the title fixed, by what must be recognized as the law of the country as construed by the treaty making power. Under the treaty, private rights of property were to be protected, but those private rights were only such as the government ceding the country to us at the time recognized itself. A repudiation by the treaty-making power of State titles was as effective as the repudiation of the grant to the Duke of Alagon in Florida. Therefore, the vacant public lands that passed under the Gadsden purchase to the United States were passed without regard to the status of the State of Sonora toward the national government of Mexico.

The State of Sonora owned vacant public lands within its boundaries on June 30, 1854; Santa Anna's government passed to this government the title to them without the State's consent, and we have ever since held it and disposed of a large portion of it under our public land laws, irrespective of the rights that the State of Sonora had to the property and without any release to us or the Mexican nation under whom alone we claim. Therefore, treating the State of Sonora as a municipal corporation owning the land within its boundaries, by grant or title paramount, which had

not theretofore been reduced to private ownership, the question can well arise as to whether or not it still owns the property, and under the protecting clause of the treaty has not some claim upon the United States for the same. I do not think any one would assume, under the circumstances, that Sonora could maintain the contention that it was entitled to the property or entitled to reimbursement for the same from the United States, but must look solely and alone to its own government for redress.

Carrying this theory a step farther, it is contended that the State of Sonora owning the title to its vacant public lands, by its laws and through its officers had transferred portions thereof to various individuals whose titles were protected under the treaty. Yet, after all, in fixing the status of the title, we must go back to the sovereign from which it originated, and the only means we have of protecting ourselves under treaties is to assume and take the actions and declarations of the treaty-making power as absolutely true, unless a fundamental law of the country places some limitation upon the right to make such declarations. In other words, it may be properly said that the decree of Santa Anna of November 25, 1853, was an admission as to the status of the title to the vacant public lands which were to be ceded to the United States.

I do not care, for the purposes of this case or this

question, what the individual views of lawyers may be as to the justice of Santa Anna's reign; it is an incontrovertable fact that he was the Dictator and ruler of the government to whom the people were submitting at the time, and from whom we purchased the property for ten million dollars. From an international standpoint, and in treating for the cession of any part of the domain of another country, this country always looks to the treaty-making power alone and never recognizes a municipal subdivision or a citizen thereof except as they may speak through that power. We have no better illustration of this principle than the position taken by Italy a short time ago as to the killing of a number of its subjects at New Orleans in what is called the Mafia riots.

If we are to assume the settling, by reason of the change of sovereignty of a portion of Sonora, the internal differences between that State and the nation, we have assumed a burden that will never reach a satisfactory conclusion and which was the cause of almost continuous revolution in the Republic of Mexico until a few years ago, when the matter was amicably settled by means of a compromise, resulting in the ultimate admission by the States of the title of the government, and surrendering whatever claims they had thereto to the national government.

We have another illustration in the settlement of the

northeast boundary line between Great Britain and the United States, involving a portion of the territory of the State of Maine, in which also Massachusetts had an interest. Although the United States obtained the consent of the States of Maine and Massachusetts to the treaty, "Lord Ashburton disclaimed all responsibility of Great Britain for any matters between the United States and the individual States referred to in that article, upon the grounds that it was an internal matter and did not concern Great Britain."

Vattel and Polson's International Law, page 155, says:

> "The sovereign is he to whom the nation has intrusted the empire and the care of the government; she has invested him with her rights; she alone is directly interested in the manner in which the conductor she has chosen makes uses of his power. It does not, then, belong to any foreign power to take cognizance of the administration of that sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it. If he loads his subject with taxes, and if he treats them with severity, the nation alone is concerned in the business, and no other is called upon to oblige him to mend his conduct, and follow more wise and equitable maxims."

This quotation from Vattel can very well be applied to the position taken by counsel for appellee in asking this court to enter into an investigation of the relations between the State of Sonora and Santa Anna's dicta-

torial government. If the decree of November 25, 1853, which was in full force and effect pending the negotiations and at the conclusion of the treaty and the exchange of ratifications, damaged or injured any of the subjects of that country, either individual or municipal, it is a matter to be settled between them. It is true we received the property subject to such private rights as that government itself recognized, and none other, and the whole controversy can be embodied in this proposition, the answer to which is the decree of Santa Anna of November 25, 1853.

Vattel and Polson's International Law, page 164, says:

> "The domain of the nation extends to everything she possesses by a just title; it comprehends her ancient and original possessions, and all her acquisitions made by means which are just in themselves, or admitted as such among nations, concessions, purchases, conquests made in the regular war, etc. And by her possessions we ought not only to understand her territories, but all the rights she enjoys.
>
> "Even the property of the individuals is, in the aggregate, to be considered as the property of the nation, with respect to other States. It, in some sort, really belongs to her, from the right she has over the property of her citizens, because it constitutes a part of the sum total of her riches, and augments her power. She is interested in that property by her obligation to protect all her members. In short, it cannot be otherwise, since na-

tions act and treat together as bodies in their quality of political societies, and are considered as so many moral persons. All those who form a society, a nation being considered by foreign nations as constituting only one whole, one single person—all their wealth together can only be considered as the wealth of that same person. And this is so true, that each political society may, if it pleases, establish within itself a community of goods, as Campanella did in his republic of the sun. Others will not inquire what it does in this respect; its domestic regulations make no change in its rights with respect to foreigners nor in the manner in which they ought to consider the aggregate of its property, in what way soever it is possessed."

In order that we may fully understand the effect of Santa Anna's decree of November 25, 1853, we should examine the decree of July 7, 1854, which provided for an investigation by the national government, through its proper departments and officers, of the conditions of the titles issued subsequent to September 1821, and providing a means by which titles which had been declared unlawful by his decree of November 25, 1853, might be validated and the persons holding the same protected in the possession thereof. In other words, his evident purpose was a commendable one to separate property claimed as private property from that which was purely national property. These two decrees taken together are a species of laws which this government has often resorted to in order to settle and

quiet titles to lands, and no better illustration can be found than in the act under which we are now operating. After Santa Anna had been deposed, these two decrees were recognized by the succeeding government by a decree of August 20, 1855, extending the time for presentation of titles for confirmation under the law of July 7, 1854. On December 3, 1855, President Alvarez repealed the two Santa Anna decrees, and President Comonfort on October 16, 1856, again denounced said decrees by declaring them void and making Santa Anna and the governors of the various departments responsible with their property for the damages they might have caused in the execution of the same. These two repealing and denunciatory laws may have become effective in the Republic of Mexico, but until they were promulgated, the decrees of Santa Anna and President Carrera were the laws of the country, bound the subject, bound the nation, and under such laws and declarations, Sonora was dismembered and dominion transferred to the United States.

Although these decrees promulgated by Santa Anna were not embodied in the treaty, yet, from another point of view, they may be said to be a construction by the Chief Executive of that country of the right of the States to have made any grants at all. In other words, it is a declaration of the executive and judicial power of that government, which, although it may not be ab-

solutely binding upon us, had the force of law in that country, and in construing the treaty and protecting property rights, should be noticed judicially and given as full force and effect as if embodied in such treaty. In adjudicating rights to private land claims under the various Acts of Congress to settle them, this court has always held that it will take judicial notice of the laws of the country from which the property was acquired. Therefore, in construing the treaty, it must be done with reference to the construction placed upon the laws of that country by the authorities of that country of which we take judicial notice. Although the construction placed upon them at the time may have been afterwards disaffirmed, yet such construction did exist at the time of the transfer of the property, and that construction should be followed in enforcing the rights under the treaty made at the time, and no subsequent reversal of such construction can affect us in determining these questions. In other words, we will not follow that government in the various constructions given to its laws subsequent to the treaty. By the law of nations, a change of government does not affect existing rights of property, but where these rights of property have been construed and fixed by the treaty-making power at the time of the treaty, we will take such construction as being binding upon the subject and upon us.

Therefore, it seems to me, unless we are going to enter into the local and political controversies in that country, we must decline to recognize any title that might have been issued by the State of Sonora which had not received the assent and approval of the national government prior to the treaty; and I insist no assent or approval has been shown.

As to the second proposition, independent of the declaration made by Santa Anna on Nov. 25th, 1853, I contend that the public lands were never the property of the States and were never granted to them by any constitution of Mexico or by any law or decree promulgated by that government, and that the declaration made by Santa Anna was historically and legally correct.

In order that we may trace the history of the title to the public lands and the various forms of government that obtained in Mexico from time to time, I start with the original proposition that the lands in New Spain belonged to the King and were administered by him through (Orozco, Vol II, page 769):

1st. The Military Chieftains of the Conquest.

2nd. The Royal Audiences.

3rd. The Viceroys and Captains-General of the colony or their deputies.

4th. The judges of exclusive jurisdiction over sales and compositions of lands and waters.

5th. The Royal Intendants.

6th. The Assemblies or municipal *ayuntamientos*.

Various changes were made from time to time as to the supervision of the passage of final title from the crown, but there was one principle running through all, and that was that the colonial officials who were authorized to initiate, could never pass final title without the prior approval and ratification of some superior official or official body. Thus, (Orozco, Vol. II page 769):

> "1st. Confirmation was not necessary until after the promulgation in the colony of the Royal Cedula of June 17th, 1617; or rather that confirmation was made by the viceroys, presidents of the audiences or captains-general of the colony, when it was not they, themselves, but their deputies who issued grant or composition titles (Chapt. 4th, Royal Instruction of Oct. 15th, 1754).
>
> "2nd. Starting from this date the Royal Confirmation was necessary for the validity of primordial titles and to make this confirmation is an exclusive attribute of the Kings of Spain.
>
> "3rd. This reservation of attributes was committed to the Royal Audiences by the instruction of October 15th, 1754 (Chap. 9th).
>
> "4th. By article 81 of the Royal Audience of Intendants, the power to confirm titles for the grant or composition of lands was entrusted to the Superior Board of the Treasury which resides in Mexico.
>
> "5th. By the Royal Cedula of March 23d, 1798, it was declared that the requisite of confirmation was not necessary, provided the grantees paid into the local revenue office two per cent of

the value of the land composed or adjudicated. This law was in force until the promulgation, in the colony, of the decree of the Spanish Cortes of January 4th, 1813.

"6th. This decree conferred the power to confirm grants of lands in the colony upon the provincial deputations spoken of in said decree. In this condition the ancient legislation on Royal lands, which we now call national or public lands, remained until the consummation of our independence."

This decree of January 4th, 1813, is only historically important in this case (Reynolds p. 83).

It will be observed that the Cortes by articles XI and XVII of this decree, while not abolishing the office of Intendant established by the Ordinance of Intendants of December 4th 1786, took from those officers the power to dispose of the royal lands and conferred it upon the *Ayuntamientos* (Common Councils) of the towns, and transferred from the Superior Board of the Treasury to the provincial deputations the power to confirm titles so issued, and as Mr. Orozco states in the passage herein quoted, this was the condition of the laws on the disposition of crown lands in New Spain at the consummation of Mexican independence. He further says, at page 113 of Vol. 1:

"This decree is the last legislative act we know of that emanated from the Spanish State and which treats of the matter of public lands.

"We will not detain ourselves in long com-

mentaries on this law, which is extremely clear in its recitals and purpose, and which we would, perhaps, render obscure, if we attempted to comment upon it. We will only call the reader's attention to the fact that, by Articles XI and XVII of this decree, the Cortes entrust to the *Ayuntamientos* (Common Councils) of the towns the authority to issue the property titles that are to be given for community, royal or vacant lands, and to the provincial deputations the power to approve or disapprove the corresponding concessions. From the promulgation of this law, then, the Intendants were deprived of authority to issue property titles for sales and compositions of lands, and if any of them did, after said promulgation, issue a title, that title would be radically void and insufficient to obtain property in an immovable by prescription."

However, commencing in 1805, there was carried on in Mexico a desultory but unsuccessful revolution growing out of the fact that Ferdinand VII, through the intrigues of Bonaparte, had submitted to Jerome Bonaparte being placed upon the throne of Spain. This occasioned quite a revolution in Mexico, not so much against Spain as it was against the reign of Bonaparte. However, in 1814, Ferdinand VII was returned to the throne, and, by decree issued at Valencia on May 4th of that year, dissolved the Cortes, refused to recognize the representative regime and re-established the absolute monarchy. Numerous other decrees were issued by him abolishing existing offices and officers and

restoring those that existed prior to the constitution of 1812, but, as a historical fact, none of these decrees seem to have been carried out in New Spain; the constitution of 1812 was again put in force by Ferdinand in 1820, and the then existing order of things continued, as stated by Mr. Orozco, until the Declaration of Independence, (Plan of Iguala) on the 24th day of February, 1821, and carried to a successful conclusion by the capitulation of the Capital in September, 1821, at which time, the title to the vacant public lands that had theretofore belonged to the King, vested in the new government. The form of the government subsequent to this can be stated as a constitutional monarchy, the intention being that Ferdinand VII should come to Mexico in person and assume control of the government. Failing in this, a regency was formed with Iturbide at the head. The basis of this new government was the plan of Iguala and the Treaty of Cordova which had been signed on August 24, 1821, by Viceroy O'Donoju and Iturbide, but afterwards repudiated by Spain.

The process of forming the government subsequent to the declination of Ferdinand, was upon the basis of a provisional council, consisting of thirty-six members, with a regency of five persons, with Iturbide as President. On February 24, 1822, a Congress, elected under the plan of Iguala and the principles announced in

the treaty of Cordova, assembled at the City of Mexico for the purpose of forming a constitution. A struggle commenced between Iturbide and the Congress, which culminated in the election of Iturbide as Emperor on May 19, 1822, and he was crowned on July 21, 1822: thus we have an Empire, with Iturbide at its head, by virtue of the successful revolution inaugurated in February, 1821, and to which Empire passed the title to the public lands that had heretofore been the property of the King of Spain. On October 30, 1822, Iturbide dissolved the Congress by force, and created what is called the "National Constituent Council." This Council was installed November 2, 1822. On December 5, 1822, Santa Anna, in revolution against the Empire, declared for its abolition and for a Republic, and the restoration of the powers of the original Congress. While Iturbide was still in control of the government on January 4, 1823, he promulgated what is known as the "Imperial Colonization Law." It provided for two kinds of grants of the public lands: one to promoters or impressarios, who should bring 200 families under contract with the executive, and the other to individuals, to be made by the Common Councils (ayuntamientos).

The revolution that Santa Anna had inaugurated in December, 1822, was continued, until, becoming successful, on March 7, 1823, the Constituent Congress, which had theretofore been dissolved by Iturbide, was

reconvened, and on March 19, Iturbide presented his abdication to that body, which was not allowed, but on April 7, 1823, it declared that his coronation had been an act of force and violence, and therefore void. It further declared that all the acts of the government from May 19, 1822, to March 9, 1823, were illegal and subject to revision by the new government. On April 11, 1823, by an order of this Congress, the Imperial Colonization Law, theretofore promulgated on the 4th of January, 1823, was suspended until a new resolution on the subject could be enacted: so we have the national government providing for the disposition of the public lands under the Empire, and upon its down-fall, we find its colonization law repealed and nullified until the succeeding government should pass some law upon the subject, leaving the control of the public lands entirely in the hands of those in charge of the national government, and taking away thereby the right on the part of any provincial official or official body to in any manner dispose of any of the public lands until some authority might be conferred by the national government therefor.

It is contended on behalf of the government that no legislation, orders or decrees were ever made by the national government, authorizing any provincial or Territorial official or official body to in any manner

dispose of any of the public lands until the promulgation of what is known as the Colonization Law of August 18, 1824, and the issuance of executive regulations of November 21, 1828. It is true, in the meantime the national government could have disposed of any of the public lands it saw proper, and the States, by the third article of the law of August 18th, 1824, could regulate colonization, subject to the restrictions mentioned.

It is contended by counsel for appellee that the title to the public lands belonged to the States of the Union, basing the claim, however, upon the same theory that the public lands within the original thirteen colonies of this country were claimed. It will be noted that the Mexican Confederation was formed in an opposite manner from the formation of the States of the North. Those subdivisions of Mexico that were afterwards designated States, were formerly provinces of Spain and the Empire, and created states by the Constitutive Act and Constitution (Reynolds 89, 116 and 124,).

I think this hurried historical statement justifies the position heretofore taken by the government that the title to the public lands was never vested in the States unless it can be shown by some direct act of the national government, it was passed to them, and I am not alone in this contention. Mr. Yoakum, in the first

volume of his history of Texas, recognizes this fact. On page 230, he says:

> "The Mexican Federal Constitution of 1824, about which so much has been said, was formed upon that of the United States, but with some fatal differences, among which * * * were the making of Congress, instead of the courts, the final interpreter of the constitution, permitting the President, under any circumstances, to command the armies of the Republic in person, and failing to define more clearly the rights of the several States of the Confederacy. However, Congress, after a labor of five months, adopted the instrument on the last day of January, 1824, though it was not proclaimed until the 4th of October following. The newly created States also went to work to establish State constitutions and to organize under them. They labored under difficulties which the States of our Union had not to encounter. Ours were States anterior to the compact: theirs were created by it. Our States were watchful and jealous of their rights; theirs had no rights except as the national government gave them, and as the Federal Congress alone had the right to construe the constitution, the States were naturally at its mercy."

Upon this same subject, in the case of the Republic of Texas vs. Thorne, 3 Texas, 499, Justice Hemphill said:

> "I shall not attempt to follow the argument in all its latitude or to define with precision the limits of the rights and powers of the federal and State governments respectively over the public

lands. But, as the subject has been much discussed, I shall consider it to some extent in connection with the special inquiry under examination. That the right of eminent domain over the public lands was originally vested in the federal government of Mexico is perhaps not now subject to question. The confederacy of the Mexican States was not formed originally by a constitutional compact between the several separate independent States, nor by a grant of the powers originally vested in the several provinces which afterwards constituted the States of the union. The public lands of the United States of the North, before the acquisition of Louisiana and Florida, belonged originally to the several States, and became Federal property by purchase or voluntary cession from the States. But, in the Mexican Union, the general government claimed originally the property in the public domain. It is true that under the former government, the provincial authorities had exercised certain powers of control over the public lands, but this was in subordination to the central or supreme authority of the country, whether vested in the Crown or represented by the Vice-Royalty of New Spain, or in the sovereign provincial governing Juntas, in the Emperor Iturbide, or the other authorities which succeeded before the assemblage of the Constituent Congress which finally adopted the federal system, and out of the municipal subdivisions of the territory, formed the States of the confederation."

Mr. Justice Hemphill also recognizes in this opinion the fact that the rights of the States to interfere or participate in the disposition of the public lands was de-

rived solely from the Colonization Law of August 18, 1824, and he says further speaking of Texas:

> "Nor did she evince, until a late period of her existence, if ever, that she claimed any right or control over the public lands, except such as was conceded to her by virtue of the national law to which we have referred."

When the controversy really arose between the nation and the states as to the ownership of the vacant public lands, Texas was the most aggressive of all in asserting her right to the public lands, as well as other rights she claimed under the Constitution, and she was the only State which participated in the revolution of 1835, that was able to make her contentions good by independence. Sonora participated in this revolution, but was not able to make any of her contentions against the national government good, finally submitting to the constitution of 1836, which deprived her of her autonomy and made her as one of the ordinary departments of the national government,

But, I am not without more modern authority. In 1885, Mr. Manuel Inda, a lawyer of very high standing and reputation in the City of Mexico, and also a member of Congress at the time, at the instance of the President was requested by the Minister of the Department of Public Works, having control over the public lands, to give his opinion as to the status of the public lands in the States, and in the course of quite a

lengthy opinion upon the formation of the Republic and the original status of the public lands, says:

> "The principal that among people governed by the federal system the National territory is formed of all and of each one of the integral parts of the Federation and controlled exclusively by the Powers of the Union cannot be proclaimed under a clearer form nor be drawn up with more conciseness. And let it not be forgotten that the American people of the north, when they established the basis of their confederation through their delegates, and when they discussed and voted for their constitution through their representatives, were organized in colonies entirely free and independent of each other, while, on the contrary, the Mexican Nation which, during the course of three centuries was subject to a single regimen, received the same impulse and obeyed the same mandates, had to proceed in an inverse sense to that in which the American nation proceeded; that is, instead of uniting themselves, it had to divide itself in a political sense, and nothing more; and for this reason it is natural and logical that it should maintain its territory complete under the sole control of the Federal Powers."

It seems to me there can be no substantial controversy as to the fact that upon the formation of the Republic under the Constitution of 1824, the vacant public lands belonged to the nation, whether situated in any of the States or Territories, and it devolves upon those who seek to sustain grants made by the officials of a

State to show the act of the national government that passed the title from the nation to the State.

U. S. vs. Hartnell's Exrs. 22, How. 288.

The only place I can find any authority for the States to interpose in the disposition of the public lands lying within their boundaries is the third article of the Colonization Law of August 18, 1824 (See Reynolds' Spanish and Mexican Land Laws, p. 121), and this is the article upon which Texas based its claim to dispose of the public lands lying within that State. With all the bright men that were in Texas reaching and grasping for an opportunity and excuse to break away from a government with which they were not in sympathy, it never occurred to any of them to claim that the revenue law of August 4, 1824 (Reynolds, p. 118), gave them any authority or control over the public lands, and I know of no State in the Republic of Mexico, except that of Sonora, that has ever claimed any right to the public lands, or the right to dispose of them on behalf of the nation, under the terms and provisions of this law. It is apparent on its face that it was purely and simply a revenue law, and never was intended to reach the public lands, which had been reserved more for the purpose of colonization than for the purpose of sale for revenue. We find, in the preamble to the *testimonio* offered in evidence, a recital of the authority under which the officials who pretended to extend this grant were acting.

They made no pretense to act under and by virtue of an original title in the State, but by virtue of a title having been granted to it by the terms of the law of August 4, 1824, thereby recognizing that if they had the right to dispose of the public lands at all, it must have been by virtue of some authority theretofore conferred by the national government.

This law classifies the revenues that are reserved to the national government, leaving the remainder to be utilized by the States. It has been contended, because of the fifteenth article of this law, apportioning the amount that each State should contribute to the national government, that therefore, in order to raise this money, it was intended that they should have the right to sell the public lands within their boundaries for that purpose. Such a contention can not be well sustained, for the reason that this apportionment was a direct tax levied by the national government upon the States, something similar to our direct tax, and there could be no good reason why the national government, if it was going to dispose of the public lands for the purpose of revenue, should delegate to the various States the authority to do this without fixing a minimum price or providing for the sale directly by federal officials. The first ten articles of this law define the revenues that are reserved to the national government. The eleventh article says: "*The revenues not included*

in the foregoing articles belong to the States." It will be noted that the ninth article of this law is as follows:

> "National property, in which is included that of the Inquisition and temporal property of the clergy, or any other rural or urban property that belongs, or shall hereafter belong, to the public exchequer."

It seems to me that if the vacant public lands were in any way the object of any of the provisions of this law, this article would reserve them to the national government, although I am perfectly satisfied that the vacant public lands in the States were not the subject directly or indirectly of this law.

Mr. Orozco in his work on "Legislation and Jurisprudence on Public Lands," published by authority of the Minister of Justice and the President in 1895, v. 1, p. 192 et seq., in discussing this question under the laws of August 4 and 18, 1824, says:

> 19. * * * *as the summum imperium, the eminens dominium* over the territory belongs to the very essence and nature of sovereignty, and as the national sovereignty resides not in the States, but in their federation, the organ of that sovereignty, recognized by foreign powers, it cannot be supposed that the nation would surrender any part of what constitutes the essence of its sovereignty, except by means of an explicit and express constitutional law."

It is true, that under the first three articles of the law of August 18, 1824, the States did have the right

to pass laws for the colonization of the public lands within their boundaries, subject always to the control of the national government; but, in doing so, they were not the owners of the land, but were given permission to regulate those who might become citizens of the State by having delegated to them the power to dispose of for the nation, for the purpose of colonization alone, the vacant public lands within their boundaries. I do not believe that it was ever intended by the national government that the States should dispose of the public lands under this law for the purpose of revenue, but that the principal consideration that was to pass for lands was colonization, improvement and cultivation, populating and settling the country with industrious and thrifty people, if it was possible to do so.

It will be noted in the preamble to the *testimonio* of this grant, there is the following recital (R. 7):

> "Jose Justo Milla, propriatory auditor of the general treasury of the free, independent and sovereign State of Sonora, encharged with the said office by the laws:
>
> "Whereas Article II of the sovereign general decree No. 70, of the fourth of August, 1824, conceded to the States the revenues (rentas) which by said law are not reserved to the national government, one of which is the vacant land in the respective districts pertaining to the same, in consequence of which the honorable constituent congress of Sonora and Sinaloa passed the law, No. 30, of

the twentieth of May, 1825, and also subsequent legislations passed other decrees concerning the same matter, which dispositions have been embodied in sections 3, 4, 5, 6, and 7 of chapter 90 of the organic law of the treasury No. 26, of the 11th of July, 1834.

"And Don Fernando Rodriguez, a resident of Hermosillo, having made formal application to this general treasury department for the registry of certain vacant and desert lands contiguous to the Gila and Colorado rivers, in the northern part of the state, the corresponding *expediente* was made out, in strict accordance with the laws."

Yet, at the time this preamble purports to have been written the State of Sonora had surrendered its autonomy to the national government under the constitution of 1836. Texas is the only state of the Mexican Republic that did not submit to this constitution and did not surrender her autonomy. From that time, until 1846, the Mexican laws, decrees and official circulars never referred to the *States* except in matters of past events. They were all created *Departments* of the national government. Those subdivisions that had formerly been territories were also created Departments, and their official status and official dignity was equal to the Departments that had formerly been States. They were all Departments, subject to the same laws and to the same control, and having identically the same rights, whereas formerly there was a marked distinction between the rights of the States and the

rights of the territories. Therefore, by virtue of this change in the form of government and change of political status of the States and territories towards the national government the laws that had theretofore been in force in the territories and in the States could not well be carried out. The law of August 18, 1824, must of necessity have been repealed by virtue of the constitution of 1836, and the law of August 4, 1824, must have suffered the same fate by reason of the laws of April 4th and 17th, 1837. The powers and duties of the governors of the various Departments, were defined and restricted by the constitution (Reynolds, p. 205). It will be noted that in defining the powers and duties of the governor, no mention is made of his right to grant the public lands in the Department. So careful was the national government in defining the powers of the governors of the various Departments that it was provided in section three of article fifteen (Reynolds, 208) that "they cannot exercise other powers than those which this law designates for them, the violation of this part of the article and the two preceding ones being a matter involving the strictest responsibility." It will thus be seen that under this constitution the law of August 18, 1824, and the executive relations issued thereunder of November 21, 1824, could not be carried into execution. Immediately following the constitution there were laws passed providing for the

disposition of the public lands in the various departments which were inconsistent with any of the laws of the national government or of any of the States that had theretofore existed, and to which, later on, we will have occasion to make specific reference.

It has further been contended that the title to the public lands was vested in the States, and that by the abolition of the States under the constitution of 1836, the title did not revert to the national government, but remained in the Departments to be disposed of as they saw proper. This contention, admitting for the sake of argument that the title was in the States, cannot well be sustained for the reason that the Departments were in all respects subordinate to the national government, and the machinery provided by the laws of the States, particularly the State of Sonora, for the disposition of the public lands, could not be well carried into execution. If the title remained in the Department, it remained there subject to the control of the national government, for the disposition of which, without recognizing the rights of the Department thereto, it passed various laws from time to time.

It has also been contended that law No. 30, of May 20, 1825, provided for the disposition of the lands as the property of the State, and that this law was never revoked by the national government, and hence it was a recognition by the national government of the right

of the State of Sonora to pass the same and to dispose of the public lands thereunder. When we take into consideration the revolutionary condition of Mexico, the fact that Sonora like Texas was a long way from the Federal district, and the inability of the government to hold the States in subjection, and having by the third article of the law of August 18, 1824, given the States the right to pass laws regulating colonization, it is not to be wondered at that no intervention was made on behalf of the national government at that time.

We find on April 6, 1830 (Reynolds, 148), a decree in relation to colonization and commerce, the third article of which is as follows:

> "*Art. 3.* The government shall have power to appoint one or more commissioners to visit the colonies of the frontier States, to contract with their legislatures for the purchase, in the name of the Federation, of the lands they may consider suitable and sufficient for the establishment of colonies of Mexicans and of other nations, to enter into such arrangements with the colonies already established as they may deem proper for the security of the Republic, to see to the exact compliance with the contracts upon the entry of new colonists, and to examine as to how far those already entered into have been complied with."

This is an evident attempt to peacefully withdraw from the States, not the ownership of the lands, but the right to pass laws regulating colonization under

the law of August 18, 1824. It was becoming apparent, on account of the controversies in Texas, that the local authorities were using the Colonization Law for the purpose of encroaching upon the rights of the national goverment, and to assume to themselves absolute ownership and dominion, irrespective of the rights that they had really obtained by virtue of the third article, and it became necessary for the national government to peacefully, if it could, withdraw the rights theretofore conferred. Subsequent history informs us that this attempt was futile, and the revolution of 1835 resulted in the forcible withdrawal of this right and the abolition of the States and State governments.

A further encroachment was made by the State of Sonora in 1834, when the law of May 20, 1825, was modified by the act of July 11, 1834 (Reynolds, 186). Neither of these laws provided for the form of title such as has been executed in this case. I know of no reason for objecting to this form of title, as it was probably a form used prior to independence under the Intendentes, and did not derive its legal sufficiency or validity, as a matter of form, from the law of Sonora or the law of the national government. It does provide for the three almonedas, such as used in this case, but I know of no national law which provides for any such manner of sale. Therefore, this title, as a matter of

form and execution, could not fall under the provisions of any law of the nation, and must rest solely for its validity upon the law of the State of Sonora, of July 11, 1834, which law, I contend, was not in force in the Department of Sonora subsequent to the Constitution of 1836.

The act creating the Court of Private Land Claims, section 13, provides:

> "That all the foregoing proceedings and rights shall be conducted and decided subject to the following provisions as well as to other provisions of this act, namely:
>
> "*First.* No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the Government of Spain or Mexico, or from any of the States of the Republic of Mexico, having lawful authority to make grants of land," etc.

I contend that this grant, made on April 12, 1838, was not lawfully and regularly derived from the Republic of Mexico, and that it was not derived from any State of the Republic of Mexico for the reason that the States had been abolished by the Constitution of 1836.

It is contended by counsel for appellee that on May 20, 1825, the Congress of the State of Sonora and Sinaloa passed a law providing for the sale of the vacant public lands of the State, and at the time of the adoption of the constitution of the State in November, 1825, a declaration of ownership of these public lands was ex-

pressly embodied in that instrument. I must take issue with this statement as a matter of fact, and refer to the translation of the constitution of the State, found on page 127 of the printed record, introduced in evidence by the appellee:

> "Article 1. The State of Occident and its territory is composed of all the towns embraced by that which was formerly called the intendency and political government of Sonora and Sinaloa. A constitutional law shall fix its limits.
>
> 2. In that which exclusively pertains to its internal government it is free, independent, and sovereign; and in that relating to the Mexican federation, the State delegates its powers and rights to the Congress of the Union."

I contend that this is not a declaration of the ownership of the vacant public lands lying within the boundaries of the State of the Occident, but only declaring the territory to be that which was formerly included within the intendency and political government of Sonora and Sinaloa. The only reference in this constitution, which I can find, that gives the congress of the State any power to legislate upon the vacant public lands, is the 20th article of the eighth section, defining the powers of Congress and its permanent committees, as follows (R. p. 129):

> "20. To make rules for colonization in conformity with the laws."

I have examined this Constitution with a great deal

of care, with a view of determining what declarations were relied upon to sustain the statement and contention of counsel, and it seems clear to me that the States at that time claimed no right to dispose of the public lands, except for the purpose of colonization, such as was authorized by the National Colonization Law of August 18, 1824. It appears from section 16 of this Constitution (R. 129) that no claim was made directly to the public lands under the act of August 4, 1824, and, unless it can be said that the national government, by the Colonization Law of August 18, 1824, had granted to the State the title to the public lands, the authority for such claim cannot be found.

The testimony taken by appellee of legal experts can well be referred to at this time. Mr. Castaneda, a lawyer by profession, stated that he had made a special examination of the laws relating to the sale and granting of land by the State of Sonora since 1824 (R. 111-112), and that the State of Sonora had ample power and authority to dispose of its public lands in the manner provided by its own laws, and further, says the reason is that the State of Sonora did not have its sovereign rights limited only as far as the authority and rights it delegated to the congress of the Union, and this is proven by article first, second, 109, section 31, article 293, of the constitution of the State of 1825. Referring to these articles in the constitu-

tion, found on pages 127, 128 and 129 of the printed record, I am at a loss to understand how he reaches such a conclusion. We know, as a historical matter, that the States derived their rights as such by the national government dividing itself into States and conferring such powers and authority upon them as it saw proper, and no more, and reserving to itself all rights not delegated.

It is evident that Mr. Castaneda belongs to that political school in Mexico, which has been unsuccessful in the attempt to subordinate the national government to a compact of confederation between the provinces, instead of the centralized school which has always and to-day predominates; the peculiar population could not maintain a personal government by the people in the sense that we understand it. The government of Mexico at no time since independence has ever been, nor is it now anything less than one absolutely subordinate to the administration in all respects, and when an attempt even at the present time is made to assert the right to oppose the continuation of the present officials in office, the opposers are declared and treated as rebels against the government.

He also testified that the State of Sonora did pass laws for the disposition of the public lands within its boundaries, and that those laws were never nullified by the national government. It

had authority under the third article of the Colonization Law of August 18, 1824, to pass laws for the colonization of the public lands lying within its boundaries, and it can well be inferred that its laws for the disposition of the public lands could have been sustained under that article, but when we come to investigate the manner of the execution of the laws, they were so much at variance with the letter and spirit of the idea of colonization that they were unable to justify it themselves, and when called to account by the Mexican government, as all of the States were about 1830, they undertook to justify this variance from the principle of colonization by claiming that the eleventh article of the law of August 4, 1824, gave them the right to pass laws for the sale, for revenue, of the public lands within their boundaries, without any control, supervisory or otherwise, on the part of the national government. I have stated before that Sonora was the only State of the Mexican Republic which ever made this contention. The State of Coahuilla and Texas relied for its authority, not upon its original ownership of the land or the law of August 4, 1824, but simply upon the colonization law of August 18, 1824. The State of Chihuahua did the same thing, as also did the State of Durango. Further on in his testimony, (R. 112), he states:

"The only limitation that the States had to dis-

pose of its public lands is that of not being authorized to colonize them, except under the basis that the decree of 18th of August, 1824, establishes; but this decree refers exclusively to colonization. By colonization, I mean to give them and to establish there what we understand a colony or union of individuals that come from other parts to settle. But that law did not prohibit absolutely the State to sell us Mexicans any of that land. This is confirmed by the fact that the Congress of the federation declared null some of the dispositions of the State on colonization, notwithstanding it did not declare null the laws of the same State, in virtue of which it disposed of said vacant land in other ways. (Decree of 21st of February, 1824, which declared null a decree of the general legislature of Coahuilla and Texas on account of having been enacted on colonization. Decree of 14th of May, 1851, which declared null a decree of the legislature of this State of Sonora on colonization.) From these decrees deduction is made that the limitation on the State only refers to colonization, and that they could dispose of it in other ways—its public lands. That all this is confirmed by our public right, according to which no one doubts the validity of the alienations as that of the Algodones ——."

This opinion clearly disclaims the fact that the laws of the State of Sonora of 1825 and 1834 were passed for the purposes of colonization, and therefore, could not come within the authority granted by the third article of the Colonization Law of August 18, 1824, which he practically admits, but falls back upon the broad

proposition that the lands always belonged to the States, and that the eleventh article of the law of August 4, 1824, was sufficient authority for them to undertake to pass laws for the sale and disposition of the public lands in any amount and for any purpose they might see proper.

Admitting for the sake of argument that his position as to the ownership of the public lands is correct, yet I do not see how he is going to sustain the position after the promulgation of the constitution of 1836. That constitution was signed by F. G. Conde, for the Department of Sonora, and his signature can be found on page 217 of the Leyes Fundamentales. Admitting also for the sake of argument that the title to the public lands, upon the abolition of the States and the creation of the Departments, vested in the Departments, still, under the new constitution and new form of government, centralized as it was and intended to be, the disposition of the public lands would be necessarily under the control of the national government. The officers were not officers of the State, although they might formerly have been so, but they were purely officers of the national government, carrying into execution national laws.

Mr. Castaneda, further on in his testimony says (R. 114), that this title was issued in 1838 under and by virtue of the laws of the State of Sonora. He also

states on cross examination (R. 114) that Sonora was a Department of the national government from 1836 to 1857 and from 1853 to 1854, necessarily implying that in 1838, at the time this grant was made, Sonora was a State. I embody in this brief the examination of Mr. Castaneda by Mr. Justice Sluss of the Court of Private Land Claims and call particular attention of the Court to the same (R. 115):

> "Q. 6. I call your attention to the expression in article 3 of the law of August 18, 1824, as follows: 'conforming themselves to the regulations established in this law', and ask you, in your opinion, whether that would include the provision of section 11, to the effect that no person should be permitted to receive more than eleven square leagues of land?
>
> "A. This law refers exclusively to colonization; that is to say, it prohibited the States to give more than that expressed in article 12 to the colonists that come to settle the vacant lands, but it did not limit the authorization or power which the States had according to their own laws to sell to any Mexican a large extension of land.
>
> "Q. 7. In view of the opinion you have given, what is your construction of the provision of section 9, to the effect that preference should be given in the disposition to Mexican citizens?
>
> "A. This law, as I have already expressed, refers to colonization, and in article 9th refers to the preference that shall be given to the Mexican citizens when they shall have come to form colonies in the State of Sonora, or any other State.

"Q. 8. Is it not a fact that the title to all the vacant lands as between the State and the Federal Government was originally vested in the Federal Government?

"A. From the moment that the nation entered into the federal system that right originally belonged to the States as owners of their own territory, in the quality of free, independent and sovereign States, with no further limitation than the powers and rights delegated by the States to the Congress of the Union.

"Q. 9. By what instrument were those powers and rights delegated to the Federal Government?

"A. By the federal constitution and also by the laws enacted by the Constituent Congress, among which is found that of August 4, 1824,in the part of which refers to lands, and that of the constitution of the State, 'section' 16th, article 293, page 84, which says: 'The revenues which the federal government did not reserve for itself by decree of classification of 4th of August, 1824, are those that, until this date, have formed the elements of which the treasury of the State is composed of.' The date of this constitution is 31st of October, 1825, and published on the 2nd of November, of the same year.

"Q. Had the State the authority to absolutely alienate its land without the consent of the Federal Government?

"A. It had."

Mr. Castaneda says with reference to the third article of the Colonization Law of August 18, 1824, that it refers exclusively to colonization and not to sales such as

this. It will be noted in his testimony (R. 112), that the colonists who were to be settled under this law, according to his construction, were to be foreigners, although the term is not used, and Mr. Justice Sluss evidently understood the witness to place that construction upon the law. And yet a preference, for the purpose of colonization, by the 9th article of the law of August 18, 1824, is given to Mexican citizens, and the twelfth article, referred to by Mr. Justice Sluss in his question, is the one limiting the power to unite in the hands of one individual more than eleven leagues of land. It would seem strange that the Mexican nation, preferring its own citizens who sought to colonize the vacant lands of the country, should limit the uniting in the hands of one individual more than eleven leagues, and yet permit the States to sell to one individual, at any price, any quantity of land it might see proper, for any purpose. Yet, we know historically, that the attempt by Texas to dispose of 400 leagues of land resulted in a revocation of the grant by the national government, and was one of the inducing causes that led to the revolution resulting in its independence. Mr. Castaneda is thrown upon the broad proposition, as he states, that the States always did own the property in the public lands, which I contend cannot be maintained. The best evidence of the fact that such a contention was of modern origin is the first three articles of the law of

August 18, 1824 (Reynolds, p. 120), which are as follows:

> "Art. 1. The Mexican nation offers to foreigners who may come to establish themselves in its territory, security in their persons and in their property; *provided*, they submit to the laws of the country.
>
> "2. The object of this law is those lands of the nation, which not being private property nor belonging to any corporation or town, can be colonized.
>
> "3. For this purpose the Congresses of the States shall enact, as soon as possible, laws or regulations for the colonization of their respective demarcations, in strict conformity with the Constitutive Act, the general Constitution and the rules established in this law."

It will be noticed that the second article specifically says that the object of this law is "*those lands of the nation* (terrenos de la nacion) *which not being private property nor belonging to any corporation or town, can be colonized.*" It seems to me that this declaration is the most pointed and direct that has been made in any of the constitutions or laws of the State or nation as to the ownership of the vacant public lands lying within the States, and it therefore appears to me, that this grant cannot be maintained by virtue of its being a State grant, and it must rest solely and alone upon the act of the officers who made it for its validity on national authority. When Santa Anna announced that

the claim made by the States to the public lands and their attempted disposition of the same without the approval or consent of the national government were void, he decreed that which was in harmony with history and prior legislation.

The constitution abolishing the States and creating Departments was promulgated in December, 1836, and about a year subsequent thereto, a revolution was commenced in Sonora, headed by General Urrea, who was the governor of the Department of Sonora at the time, and the State Congress, which had been abolished by the constitution of 1836, was reassembled, and the State government attempted to be put in full operation under the State constitution of 1825 and the laws enacted thereunder, all in opposition and direct defiance of the national government. During this time they did not pretend to execute the national laws. They were in secession against the same. They did not pretend to act under the existing national government, but in opposition thereto, and did not pretend that the grants of land that were attempted to be made under the State laws were made by virtue of any authority derived from the national government, but by virtue of original title in the State (see testimony of Mr. Robinson, R. 104-5). If the officials of the Department, headed by Governor Urrea, were in rebellion against the national government, I contend they *ipso facto* forfeited all right

or power to execute or carry into effect the laws of the national government against which they were in rebellion. That rebellion was unsuccessful, and instead of getting back to the national constitution of 1824 and the State constitution of 1825, they were carried still further into a centralized and dictatorial form of government by Santa Anna under the Bases of Tacubaye in 1841. During the secession of the State of Sonora, all of the acts of its public officials, in disposing of its public lands, were void under the laws of the former State of Sonora and under the laws of the nation as they existed at the time, and no act of theirs during this time can be sustained until it is clearly shown that it was subsequently confirmed or ratified by the national government.

Sonora was a Department from 1835 to 1846, a period of eleven years, and had no rights except those conferred upon it by the national government, and its officials had no authority except that conferred by the national government, and they had no right to exercise that authority at any time they were in rebellion and revolt against the government and its laws as they then existed; and I therefore submit that the act of these officials can not be sustained under the State law or under the national law; I care not whether in the grant the recital appears, "By these presents and in the name of the free, independent and sovereign State of Sonora,

as well also of that of the august Mexican nation, I confer, concede," etc. They were acting in violation of both.

I submit that the grant attempted to be made as a State grant, can not be sustained. I further submit that the grant as a national grant can not be sustained: first, because the officers were in rebellion against the national government and had no authority to execute the laws of the nation so as to deprive it of its property; secondly, because the sale was not made in conformity with the laws of the national government upon that subject, which I will undertake to demonstrate later on.

In addition to what has been said, I submit that this grant cannot be sustained under the laws of the nation. I understand that it is contended on behalf of appellee, that although the grant might fail as a State grant, yet the officials who made it had authority to do so under the laws of the nation, and that they have so far complied with those laws in the execution of the grant, as to at least vest an equity in the original grantee.

It is not contended that any possession, either juridical or otherwise, was delivered to the original grantee or any one for him, prior to the treaty.

Mr. Justice Field, in the case of Graham vs. U. S., 4 Wallace 259, 261, speaking of the act of juridical possession, says:

> "The Mexican law, as well as the common law, made a formal delivery of possession, or livery of seizin of the property essential, after the execution of the grant, for the investiture of the title. This proceeding was usually taken by the magistrate of the vicinage with assisting witnesses in the presence of adjoining land proprietors, who were summoned for the occasion."

My conclusion from that statement of the law is that the last act that is to be performed in passing to the grantee a complete and perfect title, is the delivery of the possession after all proceedings have been concluded by the officials of the government, and in order that we may make no mistake about it, I desire to submit in chronological order, the laws of the nation in relation to the disposition of the public lands, commencing with the repeal of the Iturbide law on April 11, 1823.

The Constitutive Act, which was the constitution of the provisional government until the promulgation of the general constitution, was adopted on January 31, 1824, (Reynolds, 116). Article one of that act provides:

> "Art. 1. The Mexican nation is composed of the provinces comprised in the Viceroyalty formerly called New Spain, in what was called the Captaincy General of Yucatan and in the Commandancies General of the Internal Provinces of the East and of the West."

Article seven designates the parts of the confederation that were to be States:

"7. The States of the Federation for the present are the following: Guanajuato, the Internal State of the West, composed of the Provinces of Sonora and Sinaloa; the Internal State of the East, composed of the Provinces of Coahuila, New Leon and Texas; the Internal of the North, composed of the Provinces of Chihuahua, Durango and New Mexico; Mexico, Michoacan, Oaxaca, Puebla de los Angeles, Queretaro, San Luis Potosi, New Santander, which shall be called Tamaulipas, Tlaxcala, Vera Cruz, Jalisco, Yucatan, the Californias, etc."

The internal State of the West was composed of the provinces of Sonora and Sinaloa. The Internal State of the North was composed of the provinces of Chihuahua, Durango and New Mexico. So that, prior to the constitutive act, Sonora and Sinaloa were not treated as States, but as provinces, and they were by said act created the State of the West. During the process of the formation of the constitutions of the nation and the States, under the constitutive act, it was necessary for the general government to determine what revenues it was going to reserve, and what it was going to permit the States to appropriate. This resulted in the passage of the law of August 4, 1824 (Reynolds, 118). Sonora and Sinaloa was the only State of the Mexican Republic that laid hold of the eleventh article of this law as the authority for claiming the ownership of the public lands within its boundaries. In order that some provision might be made

by which the public lands of the nation could be colonized and settled, the Constituent Congress, on August 18, 1824, promulgated what is known as the Colonization Law (Reynolds, 121), and it is apparent from the first, second, third, ninth, twelfth and sixteenth articles of that law, it granted to the States the right to pass laws regulating the colonization of the lands of the nation lying within their boundaries, subject to the restrictions of the law, the constitutive act and the general constitution, reserving to the chief executive of the nation the right to promulgate rules and regulations for the colonization of the public lands lying within the territories, and carrying out the power given to the chief executive in article 16. He did on November 21, 1828, promulgate regulations for the colonization of the territories (Reynolds, 141). Coahuila and Texas and Chihuahua and various other States of the Union immediately passed colonization laws under the powers granted them by the third article of the law of August 18, 1824, and proceeded in harmony, so far as the letter of the law was concerned, with the restrictions imposed. Sonora and Sinaloa proceeded to pass a law for the disposition of the public lands, and in that law of May 20, 1825 (Reynolds 129), made no reference by virtue of what authority the State assumed to regulate the disposition of the public lands, and so far as the letter of the law itself is concerned, it might well

have been overlooked by the national government, assuming that it was at least an attempt at colonization, rather than an appropriation of the property to itself for the purposes of revenue. Sonora, having been separated from Sinaloa, re-enacted the law of May 20, 1825, with some changes, by a decree of the congress of the State on July 11, 1834 (Reynolds, 186), but in this law, it does not appear by virtue of what authority derived from the national government, it was passed, unless, as in the other law, it can be assumed that it was under article three of the colonization law of August 18, 1824. These two laws, it will be observed, were purely and simply State laws.

On January 26, 1831, the national government passed a law (Reynolds, 151) creating a general department of revenues and providing for the making of regulations for its government, articles one and twenty-two of which are as follows:

> Article 1. A general department of revenues is established, under whose control shall be all branches of the treasury which are administered for the federation, except the general administration of the mail and that of the mint.
>
> * * * * * * * *
>
> 22. This decree shall not go into effect until those that regulate the general treasury and the commissaries are promulgated.

On May 21, 1831, a law was passed creating the office of Commissary General (Reynolds, 153). And on

July 20, 1831, regulations were passed which had been provided for by article 22 of the law before referred to (Reynolds, 157). The articles of the latter, to which we respectfully call attention, are 126, 127, 128, 129, 130, 131, 132 and 133, which are as follows:

126. All purchases, sales, and contracts made on account of the treasury, whatever be their purpose, shall be made by the commissaries-general sitting as boards of sale; but before convoking them it shall be absolutely necessary to receive first the order therefor, either from the supreme Government, communicated directly or through the treasury-general, or rather from the directory of revenues, when it relates to matters subject thereto.

127. Said board shall hold its sessions in the room most suitable for the purpose in the commissariats, or in the public place nearest to those offices, and the regular members shall be the commissary or sub-commissary, who shall preside, the senior officer of the treasury, or the one who acts in his stead, and the attorney-general, where there is one, and each of these employees shall take the place or seat to which he is entitled in the order in which they are named.

128. Besides the regular members, there shall be special members, depending on the sale, purchase, or contract being made, for, when it relates to the offices or revenues in the federal district which are subject to the director general; the auditor in charge thereof shall attend, and if subject to any of the other departments, the chief clerk of the bureau of accounts and records of the

department of the treasury. If it relates to supplies for army service, the officer appointed by the proper inspector shall be present; if to business pertaining to the artillery arsenals or factories connected therewith, the chief officer thereof; if to hospitals, the first assistant of the medical corps; if to fortification works, the chief of the corps of engineers; and if, finally, to other matters, the employee of the nearest related department appointed by the commissary-general, who shall give timely notice to the regular and special members of the day and hour of the sale, which ordinarily shall be at 10 o'clock in the morning.

When military officers, auditors of the director-general, and the chief clerk of the bureau of accounts and records attend as members they shall take seats in the board next after the commissary general.

129. In the other commissariats or sub-commissariats the chief officer of that department of the revenue in question, if he has his residence there, shall be a special member of the board of sale in matters relating to the revenues; so also the persons referred to in the preceding article in their respective cases or their chief clerks. In contracts relating to the army the commissaries or sub-commissaries shall give notice to the general or subordinate commanding officers to appoint the chief officer or subaltern who is to be present.

130. If there is a notary public in the place, he shall necessarily be present at the sessions of said board, and whatever is done therein shall be certified to by him, or by two attending witnesses, in case there is none.

131. That there may be occasion for holding said sessions, the sales or purchases intended to be made shall be published for at least eight days before hand by placards, which shall be put up in the most public and frequented places, and they shall be inserted in the newspapers of greatest circulation, if there be any in the place, the commissaries being careful that such notices contain the necessary information about the matter and its most essential circumstances.

132. When the sale is opened, and the customary proclamations have been made, all lawfully made bids shall be received until the day of final sale, which shall be made to the bidder who offers the most advantages to the treasury, as determined by an absolute majority of the votes of the board, which minute and everything that may have occurred at the sale shall be entered on the book, which the commissaries and subcommissaries shall keep for the purpose, and which the members shall sign with attending witnesses or with the notary, who, besides, shall draw up all other necessary papers. In the absence of the notary, a clerk, whom the commissary-general shall bring for the purpose, shall draw up the minutes and the conclusions.

133. After the legal term has expired the commissaries and subcommissaries shall forward the proceedings with their report thereon to the supreme government, *without whose approval the purchase, sale, or contract shall not be carried into effect.*"

By these regulations it will be seen that the machinery was provided by means of which the govern-

ment might sell the property of the nation for the purpose of raising revenue, and this law, although it may not directly repeal the Colonization Law of August 18, 1824, because it being one for revenue, and the other being purely and simply for colonization, yet it was inconsistent with the laws of the State of Sonora, under which the State was attempting to sell property for the purpose of revenue and not for colonization.

On March 14, 1835, the legislature of Coahuila and Texas passed a law, hereinafter copied in full, claiming the power to dispose of 400 sitios of the vacant public lands in that State, and on April 25, 1835, a national law was passed declaring this law null and void which law was as follows(Reynolds, 193):

Nullifies a decree of the legislature of Coahuila and Texas.

Article 1. The decree of the legislature of Coahuila and Texas of March 14 of the present year is, in its articles 1 and 2, contrary to the law of August 18, 1824, consequently the alienations made by virtue of said decree are null and of no value.

2. In the exercise of the powers the General Government reserved to itself in article 7 of said law of August 18, 1824, the border and littoral States are prohibited from alienating their public lands for colonization thereon until the rules they shall observe in doing so are established.

3. If any of them desire to alienate any part of their public lands, they shall not have power to do so without the approval of the General Govern-

ment, which, in every case, shall be preferred if it sees fit to take them, and shall give the States the proper indemnity.

4. The General Government can, under articles 3 and 4 of the law of April 6, 1830, by virtue of its preference right, purchase of the State of Coahuila and Texas the 400 *sitios* it says it is under the necessity of selling.

The decree cited in article 1 of the preceding law is the following:

Supreme government of the free State of Coahuila and Texas:

The governor *ad interim* of the State of Coahuila and Texas, exercising the supreme executive power, to all the inhabitants thereof, know ye:

The constitutional congress of the free, independent, and sovereign State of Coahuila and Texas has seen fit to decree —

Article 1. The government can dispose of as much as 400 *sitios* of land of the public lands of the State to meet the public emergency in which it is now situated.

2. It shall prepare regulations for the colonization of said lands under the bases and conditions it may deem proper, without regard to the provisions of the law of March 26 of last year.

3. The government shall provide the necessary means for the collection of whatever is due the State, whatever be its nature and origin.

It will be noticed that the decree of the national government, nullifying the decree of the legislature of Coahuila and Texas, in article second, says:

"In the exercise of the powers the General Gov-

ernment reserved to itself in article 7 of said law of August 18, 1824, the border and littoral States are prohibited from alienating their public lands for colonization thereon until the rules they shall observe in doing so are established."

So that we have a repeal of the third article of the Colonization Law of August 18, 1824, as to the border and littoral States; Texas and Sonora falling within this prohibition. It will be seen that the law of Texas which was nullified undertook to confer authority upon the officials of the State to dispose of 400 sitios of the public lands for the purpose of revenue. This shows clearly that whatever authority might have been given to the States under the third article of the law of August 18, 1824, as to Texas and Sonora, being one a border and littoral and the other a littoral State, was repealed, and no authority, unless thereafter conferred upon them, existed for the disposition of the public lands, except by the nation itself, and whatever rights Sonora may have had by virtue of the third article of the Colonization Law, to pass her laws of 1825 and 1834, yet that right was repealed and nullified by the same authority that conferred it.

This proceeding was followed by the law of October 3, 1835 (Reynolds 195), abolishing the States, dissolving the legislatures, and creating Departments, articles 1, 2, 3, and 5 of which are as follows:

Article 1. The governors who at present hold

their offices in the States shall so continue, even when they have completed the terms previously established in their constitutions, but subject in their continuance and in the exercise of their functions to the supreme Government of the nation.

2. The legislatures shall discontinue at once the exercise of their legislative functions; but before dissolving and after calling together those that have adjourned, they shall appoint a departmental board, composed for the present of five individuals selected from their own body or out of it, to act as the council of the governor; in case this office is vacant, they shall propose to the supreme Government such persons as have the qualifications that have been required heretofore, and until the government makes an appointment they shall perform the functions of government through the first one of the laymen named.

3. In the States where the legislatures can not assemble within eight days, the common council of the capital shall act in its stead, solely for the purpose of electing the five members of the departmental council.

5. All the subordinate employees of the States also shall continue for the present, but the places now vacant or that shall become vacant shall not be filled, and they as well as the offices, revenues, and branches of the service they manage are subject to and at the disposal of the supreme Government of the nation, through the proper governor.

On the same day and as part of the same law the President made regulations, articles 10, 12, and 13 of which are as follows:

10. In everything relating to the department of the treasury the governors and the respective officers shall proceed in accordance with the laws, regulations and orders of each state, in so far as may be compatible with the new organization of said revenues for the future.

* * * * *

12. Said governors, in matters relating to the revenues, shall communicate directly with the supreme Government through the secretary of the treasury, to whom they shall forward all documents and statements and consult when they consider necessary, being careful to cite the laws, orders and proceedings (*expedientes*) there may be on the matter.

13. Until the attributes of the Government and departmental boards in what relates to the treasury are declared by law, said governors shall make no sales of land (*fincas*) or property (*bienes*), nor contracts nor extraordinary expenses for said department, without the previous approval of the supreme Government.

From the date of the passage of this law the government ceased to be federal in form and became centralized in its character. The States lost their autonomy and became purely and simply municipal subdivisions of the national government, standing in the same relation to that government that the territories formerly did. Texas, however, as I have before mentioned in this brief, did not submit to this, but rebelled, and was maintaining her right by force of arms, resulting in independence, to pass the law which the national govern-

ment undertook to nullify, as before mentioned. Sonora also rebelled, but did not succeed, and on October 23, 1835, a basis for the new constitution was adopted (Reynolds, 201), under which the government was carried on until the adoption of the new constitution on December 29, 1836 (Reynolds, 203-208). This new constitution prescribed, with great particularity, the duties of each officer of the Departments, and nowhere is an officer of a Department authorized to make a sale or grant of the public lands. It defines the powers and duties of the governors of the Departments and departmental councils, and section 3 of article 15 is as follows:

> Restrictions on the governors and departmental councils (*juntas*): They cannot exercise other powers than those which this law designates for them, the violation of this part of the article and the two preceding ones being a matter involving the strictest responsibility.

Therefor, this constitution must, by virtue of its own terms and restrictions upon the power of the officers of the Department, have taken away from them whatever rights had been conferred upon them by virtue of the regulations of November 21, 1828, thereby resulting in a repeal of the whole colonization system as it had theretofore existed. All laws promulgated subsequent to this constitution were laws of a general nature and applied to each of the Departments, irrespective of

whether they had formerly been States or territories. That the national lands included the vacant lands within the former States or territories is evident by subsequent legislation upon this subject by which the lands of the nation were pledged for the indebtedness of the nation. The legislation under this constitution is of this character, which is an absolute construction by the proper authorities of the country that the vacant public lands in all of the Departments of the country were the property of the nation, and had not been re-ceded by the States, and being the property of the nation, could be sold, granted and mortgaged for the necessities of the country.

On January 17, 1837, a law was passed (Reynolds, 210), establishing a national bank and the creation of a redemption fund, articles 2 and 3 of which are as follows:

> 2. The Government, without loss of time, shall establish and provide regulations for a national bank, with the principal object of redeeming copper coin, the management of which shall be entrusted to persons elected by the different classes of society, in the manner said regulations shall provide, and who shall not be dependent on the Government other than to render thereto an annual report of their administration.
>
> 3. There are adjudicated to the bank for a redemption fund:
>
> First. All the real property of the nation that exists in all the territory of the Republic.

On April 4, 1837, a law was passed (Reynolds 222) providing that the government shall proceed to make effective the colonization of the lands of the Republic, which contains the following provisions:

> The Government, in concurrence with the council, shall proceed to make effective the colonization of the lands that are or should be the property of the Republic, by sales, leases, or mortgages, and shall apply the proceeds (which in the first case shall not be less than $1.25 per acre) to the payment of the national debt, already contracted or which shall hereafter be contracted, always reserving enough to meet its obligations to the soldiers who took part in the war of independence, and for the remuneration and gifts Congress may grant to Indian tribes and nations, and those who assisted in the restoration of Texas, and it shall not be compromised by the laws heretofore enacted on colonization, which enactments are all repealed in so far as they conflict with this law, but the prohibition of article 11, of the law of April 6, 1830, shall remain in force.

It will be noted that it repeals all laws in conflict with it, but especially keeps in operation the pro hibition of article 11 of the law of April 6, 1830, which relates to colonizing foreigners of adjacent countries in the States and territories that adjoin them. This would indicate a repeal of the provisions of the other laws in relation to the disposition of the public lands. In fact, it was a direct repeal thereof.

On April 12, 1837, a law was passed (Reynolds

223), creating a national consolidated fund, the seventh article of which is as follows:

> Art. 7. For greater security in the payment of the capital and interest of the consolidated fund, the Government of Mexico especially mortgages, in the name of the nation, 100,000,000 acres of public lands in the departments of the Californias, Chihuahua, New Mexico, Sonora and Texas, as a special guaranty of said fund, until the total extinction of the credits, but if any sale of these mortgaged lands should be made, it shall be at least, at the rate of said 4 acres to the pound sterling, and the proceeds thereof shall be paid by the purchaser to the agents of the Government in London, from whom only he can receive the corresponding warrant, and the latter shall employ the proceeds of the same to pay the bonds of the new consolidated fund, which shall also be received in payment of said lands, at the current price of said bonds in the market.

It will be noticed by this article that the national government specially mortgages 100,000,000 acres of lands, situated in the Departments of California, Chihuahua, New Mexico Sonora and Texas. I submit that this provision would be absolutely inconsistent with the ownership of the lands in the former States by the Departments, or any control over the vacant public lands by any of the officials of the Departments by virtue of any law of an extinct State.

On April 17, 1837, a decree was promulgated, (Reynolds, 224), creating the office of Superior Chief

of the Treasury, and providing for the manner of making purchases, sales and contracts on behalf of the nation, articles 1, 2, 4, 37, 73, 76, and 92 of which are are as follows:

Article 1. Until the general congress establishes the revenues that are to form the national exchequer of Mexico, the revenues, taxes and property of which the supreme Government is in possession, and the revenues, taxes and property which the departments established or acquired under the federal system, and which existed at the time of the publication of the decree of October 3, 1835, shall continue.

2. The revenues, taxes and property which by the law of the 17th of last January were assigned to the national bank, are excepted from the provisions of the last article until it fulfills its object.

4. Superior chiefs of the treasury shall be located in each department with the powers designated in this decree. All the employees of the treasury in their respective districts, in the instances and manner which shall be designated, shall be subordinate to them.

* * * * *

37. It is the duty of the departmental treasurers:

To muster the troops that may be in the capital; to issue to them their vouchers; to make abstracts of the muster and estimates, and to discharge, in the department of war, the powers given to the commissaries-general and auditors of the treasury by the regulations of July 20, 1831, which for the

present remain in force in all that is not opposed to this decree and subsequent laws.

* * * * *

73. All the purchases and sales that are offered on account of the treasury and exceed $500 shall be made necessarily by the board of sales, which, in the capital of each department, shall be composed of the superior chief of the treasury, the departmental treasurer, the first alcalde, the attorney general of the treasury, and the auditor of the treasury, who shall act as secretary. Its minutes shall be spread on a book which shall be kept for the purpose, and shall be signed by all the members of the board, and a copy thereof shall be transmitted to the superior chief of the treasury, for such purposes as may be necessary and to enable him to make a report to the supreme Government.

* * * * *

76. The minutes of the board shall be spread on the proper book, which shall be signed by all the members thereof, and an authenticated copy transmitted to the superior chief of the treasury to enable him to make a report to the supreme Government, when the case requires it.

* * * * *

92. The powers that by various laws are given to the commissaries-general and subcommissaries shall be exercised in future by the superior chiefs of the treasury and their subordinates, in so far as they do not conflict with this decree, for in that respect all existing laws stand repealed.

It will be noticed that the law of July 20, 1831, before referred to and quoted, was to remain in full force

when not opposed to this and subsequent laws. It will be remembered that article 131 of the law of July 20, 1831, provides that the sales and purchases intended to be made shall be published for at least eight days beforehand and by placards, which shall be put up in the most public and frequented places, and they shall be inserted in the newspapers of the greatest circulation, if there be any in the place, the commissaries being careful that such notices contain the necessary information about the matter and its most essential circumstances. This provision is not inconsistent with the law of April 17, 1837; therefore, when we take the form of the title in this case, it is clear that no attempt was made to conform to the laws of the nation in existence at the time, and it also appears that the provisions of the latter law were in no instance complied with in making this sale and grant. The officers provided in this law to make these sales were not the same as those purporting to have made the sale in this case, and the reason for this is plain and simple: they were officers of a State in rebellion against the national government, trying to carry out the laws of a State that had become extinct.

December 7, 1837, a law was passed by the supreme Government prescribing the duties and powers of governors (Reynolds 230), section 2 of article 1 of which is as follows:

It shall be the duty of these officials (governors), in the exercise of the powers of supervision given them by the sixth constitutional law in its article 7, part 12 (which article provides that the governors shall watch over the officers of the exchequer of the department in the manner the law shall provide).

* * * * *

Second. To preside over the boards of sale and of the treasury, with power to defer the resolutions of these latter until, in the first or second session thereafter the matter under consideration is more thoroughly examined into.

On September 15, 1837, there was a convention between English bondholders of Mexican bonds and the Mexican Government (Reynolds, 227), section 7 of which reads as follows:

7. For greater security in the payment of the principal and interest of the consolidated fund, the Mexican Government, in the name of the nation, specifically mortgages 100,000,000 acres of public lands in the Departments of the Californias, Chihuahua, New Mexico, *Sonora*, and Texas, as a special guarantee of said fund until a total extinction of the credits; but if any sale of the mortgaged lands should be made it shall be made at least at the rate of said *4 acres to the pound sterling*, and the proceeds shall be paid by the purchaser to the agents of the Government in London, from whom only he can receive the corresponding inscriptions, and they shall use the proceeds of the sale to redeem the bonds of the new consolidated fund, which may also be received in payment of

said lands at the price said bonds have in the market.

The Mexican Government, besides the general mortgage contained in this article, expressly reserves by a public decree 25,000,000 acres of the lands of the Government in the departments of closest communication with the Atlantic and which appear most suitable for colonization from the outside. Said lands shall be specially and exclusively set aside for the deferred bonds in case it is desired to exchange them for lands, and if the Government sell them the proceeds therefrom shall be devoted to the redemption of said bonds.

On June 1, 1839, a law was passed approving the above named convention (Reynolds, 232) and article 3 of this law is as follows:

3. With respect to the colonies that may be established by virtue of the convention, the Government shall see that the existing laws on colonization, or those that may be enacted hereafter, are observed in so far as they are not contrary to the convention itself.

On September 28, 1841, "assembled in the general quarters at Tacubaya, at the call of his excellency the general in chief of the army, well deserving of his country, Antonio Lopez de Santa Anna, the generals of divisions, of brigades," and other important officers of the army, and formulated a plan for a new government (Reynolds, 234), declaring that the supreme powers established by the constitution of 1836 should cease in their functions, and making other important

provisions as a basis for a new form of government, sections 2 and 7 of which are as follows:

> Second. No other means being known for supplying the will of the departments than to appoint a board composed of two members from each one of them, born therein or citizens thereof and now in Mexico, his excellency the general in chief shall select them, that they may, with full liberty, designate the person in whom the executive power is to be provisionally deposited. * * *
>
> Seventh. The powers of the provisional executive are all those necessary for the organization of all the departments of public administration.

On May 6, 1850, the legislature of the State of Sonora, which had been rehabilitated by the re-establishment of the constitution in 1846, passed a law, which is hereinafter copied in full, providing for the colonization of the vacant lands within its boundaries, and on May 14, 1851, the constitutional congress of the Mexican nation passed the following law (Reynolds, 296) annulling the decree:

> The decree of the legislature of the State of Sonora of May 6, 1850, is unconstitutional, which says:
>
> No. 134. The constitutional congress of the State of Sonora decrees the following:
>
> Article 1. There are colonizable in the State all the desert and vacant lands on its frontiers which belong to it and are not the property of an individual, corporation, or town.
>
> 2. To all foreigners who desire to establish

themselves on these lands and who are not disqualified to do so under the general laws, security and protection to their persons and interests are offered.

3. The State grants to every family settling on said lands one *caballeria* of irrigable agricultural land, which is an area 1,400 *varas* long by 552 *varas* wide, and a *sitio* of 5,000 *varas*, squared, of grazing land, and in addition the necessary land for building houses in town to live in.

4. The settlers on the lands under this law must establish themselves thereon and cultivate the same to enjoy the products thereof, and shall not alienate them until after six years, under penalty of losing them and of their passing to another settler who applies for them.

5. For the term of ten years from the establishment of a colony the settlers thereof are exempt from every direct or indirect tax now imposed or that the State may impose.

6. The effects, utensils, lumber, and whatever may be brought in for use or consumption of said colony are also exempt from all duties for said term.

7. All products of the colony are likewise exexempt from all taxation in the State.

8. The gold and silver taken therefrom from the time of its establishment are exempt from the assay tax of 3 per cent.

9. The Government is empowered to regulate, in its turn, the government and interior administration in the establishment of colonies that may be made on said lands, to contract for enterprises

with this object in view, and to determine the most suitable lands under the purposes and franchises of this law. If for this purpose further privileges are solicited, they may be granted at the discretion of the Government, subject to the approval of Congress.

10. Foreigners established in the colonies shall enjoy all the civil and political rights the laws give them, as also the power they thereby have to acquire every kind of real property.

11. Mexicans and foreigners shall enjoy the same privileges in a colony in Sonora, but in equality of circumstances the Mexican promotor of a colony shall alone be preferred to the foreigner.

12. The colony shall be understood as established as soon as there is gathered together therein at least the number of one hundred families in the sense of a town.

13. To the promoter who contracts for the establishment of a colony, under the articles of this law, there may be granted as a property 10 *sitios* of grazing land and its *caballerias* of irrigable agricultural land, or 10 of *temporal* land.

14. The colonists, in case of necessity, are obligated to contribute with their persons and ininterests to the defense of the State and of their new country.

Because it is opposed to article 11 of the act of reforms, May 18, 1847, which says:

It is the exclusive right of the general Congress to establish bases for colonization and to enact laws under which the powers of the union are to perform their constitutional functions. (Reynolds, 284).

And to article 2 of the general law promulgated April 25, 1825, which says:

> Art 2. In the exercise of the powers reserved to the general Congress in article 7 of said law of August 18, 1824, the frontier and littoral States are prohibited from alienating their vacant lands for colonization until the regulations to be observed in carrying it out are established.

It will thus be seen that at no time subsequent to 1835 were the frontier and littoral States or territories permitted to alienate the public lands lying within their boundaries. In 1846 after the provisional re-establishment of the constitution of 1824, the first epoch of what is known as the central system of government, ceased, and the nation continued under that constitution, although in a revolutionary state, until February 4, 1853, when the leaders of the army, in rebellion against that government, promulgated the basis of a new government, which virtually provided for the election of a Dictator.

On March 17, 1853, Santa Anna was declared elected President under this plan, and on the 22d of April of the same year, he issued his decree establishing "bases for the government of the Republic until the promulgation of the constitution throughout Mexico," and assumed supreme power. Following this, he proceeded to issue the decrees, before quoted and discussed, of November 25, 1853, and July 7, 1854, declaring the

status of the vacant public lands in what was formerly the States and Departments.

The laws upon which disposition of the public lands might be executed, are as follows:

National Colonization Law (Iturbide), January 4. 1823, (Reynolds, 100).

Law of August 18, 1824, (Reynolds, 121).

Law of January 26, 1831, (Reynolds, 151).

Law of July 20, 1831, (Reynolds, 157).

Law of April 25, 1835, (Reynolds, 193). This law annuls the colonization law of Coahuila and Texas, and prohibits the sale of the public lands in the border and littoral States for colonization, until the rules should be established by the national government.

Law of April 4, 1837, (Reynolds, 222), which we contend repeals all colonization laws.

Law of April 17, 1837, (Reynolds, 224), providing a general scheme for the revenues of the government, and particularly providing for the manner of making sales on account of the treasury. This law specifically provides that the law of July 20, 1831, shall remain in force except where its provisions are in conflict with the latter, although all these laws contain elaborate provisions for sales, purchases and contracts on account of the treasury. These repeals were in force or had been in force prior to the sale in this case, which is alleged to have been consummated on April 12, 1838.

It will be noted that the law of July 20, 1831, and that of April 17, 1837, must be considered together, as they are upon identically the same subject matter. The chief officer having charge of the matters under the law of 1831 was called the commissary general. This office was abolished by the decree of April 17, 1837, and his duties and powers devolved upon the superior chief of the treasury, and this office was abolished by a decree of December 16, 1841, and these powers and duties were conferred upon the Departmental Treasurers, so that until at least 1841, the Departmental Treasurers were not the officers to make sales on behalf of the national government. They were, first, commissary general, next, superior chief of the treasury, who it is not contended made this sale.

The officers who extended the title in this case undertook to do so both under the laws of the State and of the nation, and evidently failed in both, as they complied with neither. The petition was directed to the Treasurer-General of the State. The proceedings up to the commencement of the sale were in conformity with the State laws of May 20, 1825, and July 11, 1834, but it will be noted that the Treasurer-General of the State, was the officer who was to make the sale and extend the title for the State and no board of sales is provided for. Under the national law, however, of July 20, 1831, article 126 provides (Reynolds, 158):

126. All purchases, sales and contracts made on account of the Treasury, whatever be their purpose, shall be made by the Commissaries-General sitting as Boards of Sale; *but before convoking them, it shall be absolutely necessary to receive first the order therefor, either from the Supreme Government, communicated directly or through the Treasury-General, or rather from the Directory of Revenues, when it relates to matters subject thereto.*

Article 127 provides for holding the sessions of the Board in the Commissariats, and that the regular members of the Board shall be the Commissary or Sub-Commissary, who shall preside, the senior officer of the Treasury or the one who acts in his stead, and the Attorney-General, where there is one.

Article 128 provides, in addition to the regular members before mentioned, for special members, depending upon the character and purpose of the sale or purchase that was to be made.

Article 131 provides that these sales and purchases shall be advertised for at least eight days before hand by placards to be put up in the most frequented and public places, and also be inserted in newspapers of the greatest circulation, if there be any in the place.

Article 132 provides that a strict record shall be kept of all the proceedings which shall be signed by the members of the Board. After the proceedings of the Board have been concluded, it is necessary for the

Commissaries and Sub-Commissaries to forward the proceedings to the Supreme Government, "*without whose approval, the purchase, sale or contract shall not be carried into effect.*"

Under the national law of July 20, 1831, it is impossible for Jose Justo Milla, the auditor of the extinct State of Sonora, or the auditor of a department of the national government, acting as Treasurer-General of the extinct State, or Treasurer-General of a Department under the national government, to have had any authority to convoke this Board of Sales or to make a sale on account of the national government, because there was no Treasurer-General of the Departments and the office was unknown to the laws of the nation at the time.

Proceeding next to the law of April 17, 1837, which should be construed in connection with the foregoing law, we find article 4 of this law (Reynolds 224) provides that Superior Chiefs of the Treasury shall be located in each Department with the powers designated in this decree. Article 73 provides that all purchases and sales that are offered on account of the Treasury and exceed five hundred dollars, shall be made necessarily by the Board of Sales, which, in the Capital of each Department, shall be composed of the Superior Chief of the Treasury, the Departmental Treasurer, the First Alcalde, the Attorney-General of the Treasury,

and the Auditor of the Treasury, who shall act as Secretary. Its minutes shall be spread on a book which shall be kept for the purpose, and shall be signed by all the members of the Board, and a copy thereof transmitted to the Superior Chief of the Treasury, for such purposes as may be necessary and to enable him to make a report to the Supreme Government.

Referring to the title papers in this case, the first Almoneda says (R. 17):

> "In the city of Arispe, on the eighth day of April, 1838, the senores comprising the junta de almonedas (board of sale) having met, these gentlemen being the senior treasurer of the State by the ministry of law; the comptroller, Don Jose Justo Milla; the judge of the first instance of this district, Don Francisco Mendoza, and the administrator of revenues of this city, Don Jose Carillo, for the purpose of celebrating the first almoneda, referred to in this *expediente*, whereupon at the sound of the bell, many individuals assembled at the office of the treasurer-general, when the auctioneer, Florencio Baldizan, said in a loud and clear voice: "There will be sold on account of the public treasury of the State, five square leagues of vacant lands, a little more or less," etc.

Under the law just referred to, I do not see how this Board of Sales can be said to be a national body, composed of national officials, authorized to dispose of the public lands or property of any other character by sales or purchases. Although the law of July 20, 1831, was

not repealed except in those parts which were in conflict with this law, yet this particular board was created for the purpose of making sales exceeding five hundred dollars, and the law is silent as to those who made sales for less than five hundred dollars, and the only rational and logical conclusion that I can arrive at is, that the law of July 20, 1831, remained in force for the purpose of sales under five hundred dollars, and I am borne out in this contention by the 92d article of the law, which is as follows:

> 92. The powers that by various laws are given to the Commissaries General and Sub-Commissaries, shall be exercised in future by the Superior Chiefs of the Treasury, and their subordinates, in so far as they do not conflict with this decree, for in that respect all existing laws stand repealed.

So that the Superior Chief of the Treasury, in making sales of lands under five hundred dollars, would move under the provisions of the law of July 20, 1831; whereas, if he were making sales of land over five hundred dollars, he would move under the provisions of the law of April 17, 1837. But taking both these laws, and applying them to the recitals in the title papers in this case, and applying them to the official designations given to themselves by the various officials who participated in this grant, it will be seen that Jose Justo Milla did not occupy either generally or temporarily the office of Commissary General or Superior Chief of

the Treasury, but he attempted to act as Treasurer General of the extinct State of Sonora, and had no authority to bind the national government, and so far as the State was concerned, it had become extinct by virtue of the constitution of 1836. It is apparent then under the principle announced in the case of the United States vs. Hartnell, 22 Howard 288, that:

> "*The public domain (of Mexico) was the property of the Mexican nation*, and those who are enabled to displace that title, separate portions of it from the public lands, and vest such portions in individual proprietors by perfected titles could only do so in the exercise of sovereign power, because *the public title was a sovereign right*, and agents who assumed to exercise this authority must show that they represented the nation."

The grant cannot be sustained as a national or State grant.

It is contended by counsel that "a grant or concession made by that officer who is by law authorized to make it, carries with it *prima facie* evidence that it is within his power. No excess of them, or departure from them, is to be presumed. He violates his duty by such excess, and is responsible for it. He who alleges that an officer entrusted with an important duty has violated his instructions must show it." This principle meets with no objection on my part, but the attempted application of it to this case, I do challenge; first, because the officer making the grant is not one of extended and

general powers nor is he authorized by the law to make it, and the fact that he attempts to make it raises no presumption that he did have the power. If the mere fact of acting or pretending to act as an official carries with it any verity, shifting the burden of proof, then there has been no official of either Spain or Mexico in the ceded territory who has been too humble to assume to himself the authority to execute broad and general powers to dispose of the public lands of his King or of his government. This whole question has been settled by this Court in the case of U. S. vs. Cambuston, 20 Howard, 59-63. In speaking of the presumptions of authority upon the habitual granting of lands by Mexican governors of the territory of California, and whether the customary manner and mode of making grants does not furnish presumptive evidence both of of the existence of the power and the compliance with the forms of law in the execution, the court says:

> "We agree that the affirmative of these questions has been frequently determined by this court, in cases involving Spanish titles in the territories of Louisiana and Florida. * * * But no such presumptions are necessary or admissible in respect to Mexican titles granted since the act of 18th of August, 1824, and the regulations of 21st November, 1828.

And in the case of U. S. vs. Hartnell, heretofore cited, the court emphasizes this proposition by decid-

ing that where one claims under a Mexican grant, he must show that the granting officer represented the nation.

But Congress, in its wisdom, has seen proper to prescribe the principles upon which the courts are to adjudicate upon these titles by providing in section thirteen, that the courts should not confirm any claim until it should appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or from any of the States of the Republic of Mexico having lawful authority to make grants of land; also that no concession, grant or other authority to acquire land made upon any condition or requirement, either antecedent or subsequent, should be admitted or confirmed unless it should appear that every such condition and requirement was performed within the time and manner stated in any such concession, grant or authority to acquire land. And these instructions apply to perfect as well as imperfect grants.

I have undertaken to show at some length, by quoting and citing from the laws themselves, that Jose Justo Milla and his board did not and could not represent the State of Sonora, because it was extinct, and this grant should fail for want of authority in those attempting to extend it.

I therefore respectfully submit the case upon the following propositions:

1. That the grant, on its face, bears internal evidences of having been antedated.

2. That no equity vested in the original grantee by reason of failure to take possession of the property prior to the cession to the United States.

3. That the grant was not duly recorded in the archives of Mexico, as provided by the sixth article of the treaty of Mesilla.

4. That whatever may have been the fact as to the *locus* of the title to the property, Santa Anna, by his dictatorial decree of November 25, 1853, pending the negotiations for the treaty, declared the status of the same, which was a construction of the laws of the country by the proper officials at the time of the purchase and must enter into the construction of the treaty and claims made under its provisions.

5. That the States, independent of the declaration of Santa Anna, never held the title to the public lands, and never had any authority to sell or otherwise dispose of the public lands of the nation, except by virtue of the third article of the Colonization Law of August 18, 1824, subject to the restrictions imposed by that article and the other articles of the law.

6. That the grant, having been initiated in January, 1838, and concluded on April 12, of the same year, if it sought to bind the nation thereby, must have been executed under its laws in force at the time, and I con-

tend that those laws in force at the time were the laws of July 20, 1831, as modified by the law of April 17, 1837, which I have undertaken to demonstrate.

7. That even admitting that the officers who attempted to execute this grant had the power to do so under the laws of the nation, the record discloses that they were in secession against the national government, in violation of its constitution and laws, and *ipso facto* had no right, without subsequent ratification and approval, to despoil the nation, against which they were rebelling, of its property.

Lastly, they had no right to execute the laws of Sonora, because that State lost its autonomy, its laws had become extinct, and these officers had lost their status as officers of the Stete, except as they sought by force of arms and secession, to re-establish themselves against the national government.

We therefore respectfully submit that this grant should not be confirmed upon each and every one of the grounds before stated.

Respectfully submitted,

HOLMES CONRAD,

Solicitor-General.

MATTHEW G. REYNOLDS,

Special Assistant to the Attorney-General.